SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

Supreme Court, U. S.
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October Term, 1974

No. 74-672

CITY OF LOS ANGELES, a municipal corporation,

Petitioner,

vs.

IRVING D. AARON, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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Petitioner,

vs.

IRVING D. AARON, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The Petitioner, City of Los Angeles, a municipal corporation, prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeal (Second Appellate District) of the State of California rendered in this proceeding on September 4, 1974.

Opinions Below.

The California Supreme Court denied a petition for hearing on August 28, 1974. This denial is reported in 12 Cal.3d, Official Advance Sheets No. 26, dated September 19, 1974, page (2) of Supreme Court Minutes, and appears at Appendix A. The opinion of the Court of Appeal is reported in 40 Cal. App.3d 471 and for the convenience of the Court appears at Appendix B. The opinion of the Superior Court is not reported in

any official California reports but is reported in 11 Avi. 17,642 and for the convenience of the Court appears at Apendix C.

Jurisdiction.

The decision of the Court of Appeal, Second Appellate District, of the State of California, affirming the trial court judgment, was entered on September 4, 1974. (See Appendix B.) A petition for hearing to the California Supreme Court was denied. (See Appendix A.) This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

The judgment in the case at bar directs recovery against the City of Los Angeles in favor of property owners in the vicinity of Los Angeles International Airport due to noise emanating from jet aircraft operating at the Airport. The City of Los Angeles owns the Airport but not the aircraft operating at its facility. Domestic air carriers operating at Los Angeles International Airport engage in interstate and international commerce under the authority of Air Carrier Operating Certificates issued by the Federal Aviation Administration (the "FAA"). Foreign carriers are certificated into Los Angeles under the provisions of international treaties. Pacific Southwest Airlines holds a Commercial Operating Certificate issued by the FAA. The questions thereby arising are:

1. Whether or not the responsibility for the consequences of jet noise must be borne solely by the airport proprietor;

2. Whether the preemption doctrine of the United States Constitution acts so as to preclude liability of the Airport proprietor in this action;
3. Whether the imposition of liability on the airport operator results in an undue burden on interstate commerce in violation of Article I, Section 8 of the United States Constitution;
4. Whether or not the doctrine announced in *Griggs v. Allegheny County* (1962) 369 U.S. 84 must be reviewed in light of developments subsequent to 1962.

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Article I, Section 8, Clause 3:

> "The Congress shall have power
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Constitution of the United States, Article VI, Paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Federal Aviation Administration Act of 1958, 49 U.S.C. §1301 *et seq.* (See Appendix D.)

Airport and Airways Development Act of 1970, 49 U.S.C.A. §1701 *et seq.* (See Appendix E.)

Noise Control Act of 1972 (PL 92-574). (See Appendix F.)

Statement of Case.

The case at bar was instituted in 1964 sounding in inverse condemnation. The Complaint alleged that due to the flight of jet aircraft to and from Los Angeles International Airport, properties in the vicinity of said Airport had diminished in value resulting in the taking of an easement in said properties. There was no claim for physical damage to said properties. Approximately 750 parcels of real property are involved in the action and damages were awarded to 520 property owners for a total award of approximately $650,000. The final trial court judgment was entered on March 15, 1972. This followed an interlocutory judgment of August 10, 1970 wherein the trial court found a taking of an interest in 520 of the properties and awarded damages accordingly.

The properties are located in the cities of Inglewood, El Segundo and Los Angeles and in Lennox, which is an unincorporated area of Los Angeles County. Approximately 500 of the total properties which sustained diminution are outside the boundaries of the City of Los Angeles.

The City of Los Angeles owns Los Angeles International Airport. The City, however, does not own or operate the jet aircraft which utilize its facilities, nor does the City of Los Angeles control the flight of jet aircraft certified by the United States of America to operate at the Airport.

Los Angeles International Airport is the second busiest publicly owned, commercial airport in the word from the standpoint of traffic. It serves approximately 22 million passengers a year and accommodates every domestic major trunk air carrier in the United States,

as well as numerous foreign flag carriers. The airport serves all of Southern California and has a major impact on interstate commerce and the economy of the entire region. Each scheduled interstate carrier holds an Air Carrier Operating Certificate issued by the FAA, Pacific Southwest Airlines holds a Commercial Operating Certificate issued by the FAA, and the foreign carriers are certificated into Los Angeles under the provisions of international treaties.

The FAA operates the control tower and the radar and approach and departure control at the airport. The Federal Government has spent millions of dollars on navigational aids at the airport, which aids include the Instrument Landing System ("ILS"), the Approach Light System ("ALS"), Runway and Identification Lights, and radar and radio equipment.

No aircraft may taxi or take off from the airport without first receiving an appropriate clearance from the air traffic control tower. When a commercial jet aircraft is ready for departure from its terminal gate, it makes radio contact with the tower, is assigned a runway for takeoff, and is given a clearance to taxi thereto. Prior to taking its position on the runway the aircraft is given departure clearance, which includes assignment of departure procedures and assignment of the radio beam intersection to which the aircraft is directed to fly prior to making its turn.

On receiving its clearance to take off, each aircraft is required to conform with all FAA takeoff procedures, and upon reaching an altitude and position clear of other traffic, control of the aircraft is passed from Los Angeles Departure Control to the FAA Air Route Control Center located at Palmdale, California.

At all airports with control towers operated by the United States, such as Los Angeles International Airport, all operations to, from, or on the airport are regulated by the FAA in an effort to maintain traffic separation and avoid collision. Landings and departures, which are permitted only after clearance is obtained from FAA personnel, are made pursuant to procedures and regulations of the FAA, which prescribe in detail such items as the route of the aircraft approaching or leaving the airport, its angle of flight, altitude at any given point, speed, and the runway the aircraft may use. Standard Instrument Approach Procedures for Airports, such as Los Angeles International, are published as regulations by the FAA and are available to each pilot in the form of charts.

Standard Instructions of Departure Procedure established by the FAA are published by the Coast and Geodetic Survey, and when incorporated in a departure clearance issued by the tower must be complied with by the pilot. The FAA tower at Los Angeles International Airport has established noise abatement procedures which are designed to reduce the community exposure to noise, and which are required to be complied with by the pilots.

However, the City of Los Angeles, due primarily to the decision of this Court in *Griggs v. Allegheny County* (1962) 369 U.S. 84 has been held solely liable for the consequences of noise emanating from jet aircraft. Indeed, the City of Los Angeles has actions pending against it claiming hundreds of millions of dollars in property damage and personal injury claims.

Prior Raising of Federal Questions.

The City of Los Angeles has raised the applicability of federal questions at each stage of the litigation: Trial Court, Court of Appeal, and Supreme Court of California. The questions were raised as follows:

A. Los Angeles County Superior Court (Trial Court)

1. Answer to First Amended Complaint filed June 15, 1964, Fourth Affirmative Defense;
2. Joint Pretrial Statement dated November 19, 1968, issue 6 under "Issues and Subissues" and Contention 1 under "Defendant's Contentions." Said Joint Pretrial Statement was incorporated and made a part of the First Pretrial Conference Order, filed on December 2, 1968.
3. Defendant's Opening Trial Brief, Topic IV, filed on July 15, 1969.

The trial court disposed of these matters as follows:

a. Memorandum Opinion filed February 5, 1970 (See Appendix C.)

b. Conclusion of Law III filed August 7, 1970 which states:

> "The flights of jet aircraft over and above, around and near parcels of real property set forth in Schedules A and B, and otherwise listed in the plaintiffs' first amended complaint, and the resulting noise, vibrations or emissions of unburned fuel oil or

smoke do not fall within an area preempted by the Government of the United States of America or the Government of the State of California under any provisions of law existing at the time of the flights complained of by plaintiffs."

B. California Court of Appeal, 2d Appellate District

1. Appellant's Opening Brief served and filed in January, 1973. (For Disposition, see Appendix B.)

C. California Supreme Court

1. Petition for Hearing filed August 9, 1974. (For Disposition, see Appendix A.)

REASONS FOR GRANTING THE WRIT.

A. Introduction.

This Court, speaking through Justice Douglas, stated in *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624, 36 L. Ed. 2d 547, 556:

> "What the ultimate remedy for aircraft noise which plagues many communities and tens of thousands of people is not known."

However, the California Court of Appeal has decided that the remedy is to assess damages against the proprietor of the airport, thereby assessing damages against the one entity which has the least authority in the area to reduce noise. The airport operator cannot control the flight of jet aircraft. Such authority rests with the United States. To effectively control noise, an entity must control flight, aircraft certification and commerce of the United States. A municipality which owns an airport is not such an entity, only the United States, through the FAA has such authority and control.

Mr. Justice Jackson, concurring in *Northwest Airlines, Inc. v. Minnesota* (1944) 322 U.S. 292 stated at page 303:

> ". . . Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders."

B. The Preemption Doctrine Acts so as to Preclude Liability of the Airport Operator.

1. Congressional Intent Is That of Preemption.

The basic question here is whether Federal regulation has so occupied the field that the consequences of jet noise have been preempted by the United States. Since preemption is essentially a question of Congressional intent, we turn first to the Federal statutory scheme.

The statutory scheme involved here begins with the FAA Act of 1958, 49 U.S.C. §1301, *et seq.* (the "Act"). The Act initially declares that "there is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." 49 U.S.C. §1304. The Act then continues to authorize and direct the Federal Aviation Administrator (the "Administrator"):

> ". . . (T)o develop plans for and formulate policy with respect to the use of the navigable airspace, and assign by rule, regulations, or order the use of the navigable airspace under such terms, conditions, and regulations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace." 49 U.S.C. §1348(a).

As one aspect of his authority to centralize and control airspace, the Administrator regulates the subject matter of noise abatement. The 1958 Act directs the Administrator to prescribe air traffic regulations:

> ". . . for the protection of persons and property on the ground. . . ." 49 U.S.C. §1348(c).

Pursuant to this authority, the Administrator has promulgated extensive regulations to carry out his responsibilities in the field of noise abatement. In addition, the authority of the Administrator to deal with the problem of noise was increased by the Congress in 1968, when it amended the Act requiring the Administrator to prescribe:

> ". . . such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise. . . ." 49 U.S.C. §1431.

While recognizing that airport operators might lessen the effect of aircraft noise by zoning land areas near airports to assure use compatible with aircraft operations, the Senate Report on the 1968 Legislation reflected the conclusion that the Federal Government had preempted any power of the state and local governments to deal with aircraft noise by controlling the flight of aircraft:

> "In this regard, we concur in the following view set forth by the Secretary [of Transportation] in his letter to the committee of June 22, 1968:
>
> "The courts have held that the Federal Government presently preempts the field of noise regulations insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. *American Airlines v. Town of Hempstead,* 272 F.Supp. 226 (U.S.D.C.E.D., N.Y. 1967). The court said, at 231, 'The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those

> of the ordinance must come from a Federal source.' H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft." (Senate Report No. 1353, 90th Congress, Second Session, July 1, 1968, 2 U.S. Code Cong. § Ad. News 2693-94 [1968].)

Under the terms of the 1968 regulation, the Administrator has promulgated aircraft type certification regulations in accordance with his responsibilities in the field of noise control and abatement and has issued a Notice of Proposed Rule Making to adopt a new Federal Aviation Regulation in regard to sonic boom by civil aircraft. 35 Fed. Register 6168, April 16, 1970.

In the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 49 U.S.C.A. §1701, *et seq.*, Congress exercised further authority in the field of aviation. In enacting this legislation, Congress expressly found and declared "that the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation" and "that substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense."

There can be no question but that Congress intended to place exclusive control of the airspace with the Federal Government. This intent expands into the control of noise from jet aircraft. This expression cannot be

construed to place intolerable financial burdens on airport operators that are vital factors in carrying out Congressional intent.

2. This Area Complies With the Tests of Rice v. Santa Fe Elevator Corp.

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 281, 230 (1947), this Court announced the three classic tests for determining whether the Federal Government has preempted an area: (1) whether the scheme of Federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the "touch a field" in which the Federal interest is so dominant that the Federal system will be assumed to prestates to supplement it; (2) whether Federal regulations clude enforcement of state laws on the same subject; or (3) whether the state policy may produce a result inconsistent with the objective of the Federal statute. These three tests have been employed by the Supreme Court in subsequent preemption cases such as *Pennsylvania v. Nelson*, 350 U.S. 497 (1956). The above-described pattern of comprehensive and complex Federal regulation fulfills all three *Rice* tests.

The Federal scheme of regulation of air transportation is so pervasive as to compel the inference that Congress left no room for the states to supplement it. Indeed, the Federal District Court for the Eastern District of New York, in invalidating the noise abatement ordinance enacted by the *Town of Hempstead* directed at the New York International Airport, reached this very conclusion:

> ". . . It would be difficult to visualize a more comprehensive scheme of combined regulation, sub-

sidization and operational participation than that which the Congress has provided in the field of aviation. . . .

". . .

". . .

"The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempsted Ordinance. . . ." (*American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 226, 232-33 [E.D.N.Y. 1967], aff'd without reaching preemption issue, 398 F.2d 369 [2d Cir. 1968], cert. denied, 393 U.S. 1017 [1969].)

Federal preemption of airspace management was also a basis of decision in *American Airlines, Inc. v. City of Audubon Park, Kentucky*, 297 F.Supp. 207 (W.D. Ky. 1968), aff'd 407 F.2d 1306 (6th Cir. 1969), where the Court invalidated an ordinance making it unlawful to fly any aircraft over the corporate limits of the City of Audubon Park at a height of less than 750 feet. The Court concluded that "the statutes enacted by the Congress clearly expressed an intent fully to preempt the field of law and regulation of interstate and foreign air traffic." 297 F.Supp. at 212.

In short, the Congress of the United States has enacted a comprehensive and pervasive scheme of airspace management and control of aircraft. The Federal Aviation Act itself, the legislative history of the Act, and the FAA regulations promulgated pursuant to the Act, all indicate that Congress intended to confer "plenary" authority upon the Administrator to deal with air traffic airspace management, flight and noise regulations.

It seems equally apparent there that preemption has occurred within the meaning of the second *Rice* test, *i.e.*, the act of Congress "touches a field" in which the Federal interest is so dominant that the Federal system will be assumed to preclude enforcement of state laws on the same subject. National rather than state or local control of interstate surface transportation has long been the policy of Congress (See *City of Chicago v. Atchison, Topeka & Santa Fe Railway*, 357 U.S. 77, 87 [1958]), and the Federal interest is even more dominant in air transportation, as the Supreme Court has emphasized in the *Waterman S.S. Corp.* case:

> "Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before. . . . A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past." (*Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 107 [1948].)

Finally, application of the third *Rice* test—whether the state or local regulation would produce a result inconsistent with the objective of the Federal law—makes it equally clear that a local ordinance must fall before

the extensive Federal legislation on the subject of air commerce. *Cf., Pennsylvania v. Nelson,* 350 U.S. 497, 508-10 (1956); *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). The Federal Aviation Act was aimed at securing the "efficient" as well as the safe use of airspace, and this objective was to be achieved by vesting "plenary" control in the Administrator.

In the opening paragraph of *City of Burbank v. Lockheed Air Terminal, Inc.* (1973) 411 U.S. 624, 36 L. Ed. 2d 547, this Court stated at 36 L. Ed. 2d 549:

> "The Court in *Cooley v. Board of Wardens,* 12 How. 299, 13 L.Ed. 996, first stated the rule of preemption which is the critical issue in the present case. Speaking through Justice Curtis, it said:
>
> > 'Now the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.
> >
> > '. . . Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such nature as to require exclusive legislation by Congress.' Id. at 319, 13 L. Ed. 996."

The Court in *Burbank, supra,* continued with the following statements in its opinion:

"The Federal Aviation Act of 1958, 72 Stat 737, 49 USC §§1301 et seq. [49 USCS §§1301 et seq.], as amended by the Noise Control Act of 1972, 86 Stat 1234, and the regulations under it, 14 CFR Pts. 71-77, 91-97, are central to the question of preemption. (Page 550.)

"As stated by Judge Dooling in *American Airlines v. Hempstead,* 272 F. Supp. 226, 230, aff'd. 398 F2d 369:

> 'The aircraft and its noise are indivisible; the noise of the aircraft extends outward from it with the same inseparability as its wings and tail assembly; to exclude the aircraft noise from the Town is to exclude the aircraft; to set a ground level decible limit for the aircraft is directly to exclude it from the lower air that it cannot use without exceeding the decible limit.' (Page 554).

"The original complaint was filed on May 14, 1970; the District Court entered its judgment November 30, 1970; and the Court of Appeals announced its judgment and opinion March 22, 1972—all before the Noise Control Act of 1972 was approved by the President on October 22, 1972. That Act reaffirms and reinforces the conclusion that FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control. (Page 553).

"Our prior cases on preemption are not precise guidelines in the present controversy, for each case turns on the peculiarities and special features of the federal regulatory scheme in question. Cf. *Hines v. Davidowitz,* 312 US 52, 85 L Ed 581,

61 S Ct 399; *Huron Portland Cement Co. v. Detroit*, 362 US 440, 4 L Ed 2d 852, 80 S Ct 813, 78 ALR2d 1294. Control of noise is of course deep-seated in the police power of the States. Yet the pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls. What the ultimate remedy for aircraft noise which plagues many communities and tens of thousands of people is not known. The procedures under the 1972 Act are underway. In addition the Administrator has imposed a variety of regulations relating to takeoff and landing procedures and runway preferences. The Federal Aviation Act requires a delicate balance between safety and efficiency. 49 USC §1348(a) [49 USCS §1348(a)], and the protection of persons on the ground. 49 USC §1348 (c) [49 USCS §1348 (c)]. Any regulation adopted by the Administrator to control noise pollution must be consistent with the 'highest degree of safety.' 49 USC §1431 (d) (3) [49 USCS §1431(d)(3)]. The interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objective underlying the Federal Aviation Act are to be fulfilled." (Pages 556, 557).

Subsection (b)(1) of Section 611 of the Noise Control Act of 1972 states in part:

"In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards

for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom. . . ."

The United States Supreme Court in *Burbank, supra* concludes that the "FAA, now in conjunction with the EPA, has full control over aircraft noise, preempting state and local control." (P. 553.) Jet aircraft are inherently noisy objects. As long as they fly, they will produce noise. Therefore, the only effective way to control noise is to control the flight of jet aircraft. If airport operators attempted to impose restrictions on flight, such as imposing curfews, it would place a profound effect on interstate commerce in the United States. Yet, there is no way airport proprietors can bear the *entire* financial burden for the consequences of jet noise. Is the answer to financially cripple the airport operators causing them to close?

C. To Impose Liability on the Airport Operators Results in an Undue Burden on Interstate Commerce.

The power given the Congress of the United States in Article I, Section 8, Clause 3 of the United States Constitution to regulate commerce among the several states has frequently been held to invalidate attempts by state and local governmental entities to regulate facilities or instrumentalities of interstate commerce. Thus, the Supreme Court of the United States has declared unconstitutional such diverse statutes as those regulating the length of railroad trains, *Southern Pacific Company v. Arizona,* 325 U.S. 761 (1945); prohibitng the conveying of specified types of cattle into the state

between March and November of every year, *Railroad Company v. Husen*, 95 U.S. 465 (1877); and unreasonable interfering with the movement of trucks involved in interstate commerce, *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959). Even more significant for purposes of the present case are those cases in which Federal courts have stricken down local ordinances which, though enacted for aircraft noise-control purposes, would have unreasonably burdened interstate commerce. *American Airlines, Inc. v. City of Audubon Park*, 272 F.Supp. 207 (W.D. Ky. 1968) aff'd, 407 F.2d 1306 (6th Cir. 1969); *American Airlines, Inc. v. Town of Hempstead*, 272 F.Supp. 207 (E.D.N.Y. 1967), aff'd without reaching commerce clause issue, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017 (1969); *All American Airways, Inc. v. Village of Cedarhurst*, 106 F.Supp. 521 (E.D.N.Y. 1952), aff'd, 201 F.2d 273 (2d Cir. 1953).

The basic reason underlying such zealous protection of the free movement of instrumentalities of interstate commerce is stated in *Edwards v. California*, 314 U.S. 160 (1941), where the Supreme Court invalidated a state statute prohibiting the knowing transportation in California of indigent persons. The Court stated that there is no boundary to the permissible area of state legislative activity "more certain than the prohibition against attempts on the part of any single state to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders." (314 U.S. at 173.)

The Supreme Court in *Southern Pacific Company v. Arizona*, 325 U.S. 761 (1945):

> ". . . (E)ver since *Gibbons v. Ogden*, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority." (325 U.S. at 767.)

If airport operators throughout the United States could freely adopt regulations to curb flight to reduce noise, the result is a substantial interference with the free flow of commerce among the several states. This is precisely what the Commerce Clause of the Constitution prohibits. As Justice Jackson stated in his concurring opinion in *Northwest Airlines, Inc. v. Minnesota*, 332 U.S. 292, 303 (1944):

> "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."

It necessarily follows that the imposition of severe financial liability on the airport operator results in an undue burden on interstate commerce.

D. The Supremacy Clause Prevents Effective Local Control of Aircraft Noise.

The Supremacy Clause of the United States Constitution, Article VI, Paragraph 2, provides that the laws of the United States shall be the supreme law of the land, anything in the law of any state to the contrary notwithstanding. The Federal Aviation Act declares that there exists "in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States." Contrary to the declaration of this right in the Federal Aviation Act, an airport operator cannot effectively deny access to the federal airspace to commercial airline passengers and other jet users. Any such state prohibition of a federally guaranteed right must fall before the Supremacy Clause. *Sperry v. Florida ex Rel. Florida Bar,* 373 U.S. 379, 385 (1963).

Moreover, the interstate air carriers which use airports and conduct business there are authorized to do so by Certificates of Public Convenience and Necessity issued by the Civil Aeronautics Board. The existence of these federally conferred rights brings this case squarely within *Castle v. Hayes Freight Lines, Inc.,* 347 U.S. 61 (1954). There the Supreme Court held that where an interstate motor carrier holds a Certificate of Convenience and Necessity issued by the Interstate Commerce Commission under the Federal Motor Carrier Act, the federal Supremacy Clause prevents a state from suspending the carrier's right to use the state's highways in its interstate operations as punishment for repeated violations of state highway regulations. The airport proprietor is in no different position.

In the case of commercial aviation it is equally clear that placing an undue burden on jet operations is the

equivalent of a partial suspension of the federally granted certificates of the interstate air carriers which operate in and out of commercial airports. The supremacy of federal law, as illustrated in the *Castle* case, forbids such a partial suspension of the federally conferred rights.[1]

The foreign carriers, of which there are many serving Los Angeles and other airports, are covered by the convention of International Civil Aviation, dated December 7, 1944, with 144 signatories, known as the "Chicago Convention." In *Aerovias Interamericanas de Panama, S.A. et al. v. Board of County Commissioners of Dade County, Florida* (1961) 7 Avi. 17,567, 197 F.Supp. 230 (D.C. Fla.) it was held that such treaties are the law of the land and supersede any state or municipal laws in conflict therewith; and that the treaties are self-executing and need no further implementation by Congress.

Based upon the foregoing discussion, there can be no question that the airport proprietor *cannot* effectively control noise from jet aircraft. This can only be done by the Federal Government. Nor can the airport proprietor effectively curb the effects of noise by land-use planning. In the case of Los Angeles International Airport, only a portion of the complaints are from residents of the City of Los Angeles. The City of Los Angeles cannot adopt zoning laws for its neighboring cities. The City of Los Angeles cannot develop land-use plans beyond its boundaries. Yet, in spite of all

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[1]The Federal Aviation Act provides that the Certificates of Public Convenience and Necessity held by the interstate air carriers cannot be revoked unless the carrier fails to comply with an order of the CAB requiring obedience to a federal rule found to have been violated. 49 U.S.C. §1371(g).

this, the City of Los Angeles, as the proprietor of Los Angeles International Airport, remains solely liable for the consequences of jet noise. Such liability indeed is contrary to the intent and purpose of the Supremacy Clause of the United States Constitution.

E. Griggs Must Be Reviewed in Light of Developments Subsequent to 1962.

However, in spite of what has been said above, primarily because of *Griggs v. Allegheny County* (1962) 369 U.S. 84, the airport proprietor must stand alone in compensating properties adversely affected by jet noise. *Griggs, supra,* is cited extensively by the Court of Appeal and it is obvious that *Griggs* was given great weight in the opinion.

Questions which must be answered are what is the effect of Burbank, *supra,* and other developments since 1962 on the *Griggs* decision? Is *Griggs* equitable today? In light of the waters which have been charted since 1962, is *Griggs* in keeping with the times? It is the position of the City of Los Angeles that this Court should review the *Griggs* doctrine as it relates to the field of liability.

In *Griggs, supra,* the factual situation occurred in 1952. At that tie "navigable airspace" as defined by the United States Congress in 49 U.S.C.A. 180 was limited to "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Board." The minimum safe altitude as defined by the CAB was 1,000 feet above congested and 500 feet over other than congested areas. The flights in the *Griggs* case which allegedly caused the injuries, involved takeoffs and landings and were below said "minimum safe alti-

tudes." These flights were found by the Pennsylvania Supreme Court not to be within the public domain. The Pennsylvania Supreme Court, for other reasons, found against the plaintiffs in *Griggs* but were reversed by the United States Supreme Court.

The United States Supreme Court concurred with the Pennsylvania Supreme Court in finding that the flights taking off and landing in the *Griggs* case were not in the "public domain." They analogized to the necessity for a county to acquire approaches to a bridge it had constructed in support of its ruling that the airport authority had the duty to acquire the necessary easements for the privilege of aircraft landing at and approaching the airport. By not acquiring such air easements, Allegheny County was, in effect, forcing flights of aircraft in landing at, and approaching, the airport to trespass over private property.

The Congress, in 1958, by legislation included, for the first time, within the definition of "navigable airspace," "airspace needed to insure safety in takeoff and landing of aircraft." 49 U.S.C.A. 1301(24). Congress has declared that there exists a "public right of freedom of transit through navigable airspace." 49 U.S.C.A. 1304. Consequently, as a result of this Congressional action, an airport does not need to acquire air easements for the privilege of aircraft approaching and landing at airports. In making airspace necessary for the landing of aircraft part of the "navigable airspace," said airspace needed for landing and taking off is part of the "public highway."

Further, the Congress adopted the Airport and Airway Development Act of 1970, 49 U.S. Code 1701 which is:

"An Act to provide for the expansion and improvement of the Nation's airport and airway system, . . ."

In addition, the Congress adopted the Noise Control Act of 1972. This Act was discussed extensively in *Burbank, supra,* and is a positive expression of Federal control.

The Court of Appeal, in this action, 40 Cal.App.3d 471, at page 490 of its opinion, states in part:

"California has adopted extensive regulations for the control of noise by airport proprietors. (Pub. Util. Code 21669; 4 Cal. Admin. Code §§5000-5080.5; . . ."

The constitutionality of these noise regulations and Section 21669 is currently being challenged in the United States District Court, Northern District of California in an action entitled *Air Transport Association of America, et al. v. J. R. Crotti, Director of Aeronautics, of the State of California, et al.,* No. C-72-2189WTS. On July 9, 1974, the Court[2] heard oral argument on Plaintiff's Motion for Summary Judgment. The matter now stands submitted. If the statute and the regulations are declared unconstitutional, what will be the effect of the proprietors' ability to control noise? This action presents another development which must be weighed when one speaks of the *Griggs* doctrine.

On page 491 of the California Court of Appeal opinion (40 Cal.App.3d 471), the Court stated in part:

"Obviously a final solution to the problem will require numerous different approaches to it and the cooperation of airplane manufacturers, the air-

[2]A three-judge panel sat in this action.

lines, federal, state and local government. Although many parties other than the City may have helped to create the problem, the City's role as planner, owner and operator of the airport is sufficient to require it to compensate the plaintiffs in this case. (*Griggs v. Allegheny County, supra,* 369 U.S. 84, 89-90, 7 L.Ed.2d 585, 589.)"

What type of cooperation does the Court envision from the manufacturers and airlines? Progress in reducing jet noise in aircraft is, and has been, very slow.[3] In suits in which the City of Los Angeles has filed cross-complaints for indemnification against air carriers, they seek the shield of *Griggs* and readily concur that the airport operator is liable.[4] Indeed, by its Seventh Affirmative Defense in the case at bar, the City of Los Angeles alleged that there was a defect of parties because the airlines were not in the action. What cooperation is envisioned between state, federal and local governments? All levels of government are willing to cooperate as long as it is understood that the airport operator is financially liable. This is the position taken by the State of California in *Air Transport Association of America* action, *supra.*

Therefore, it necessarily follows that a hearing should be granted in this action to review *Griggs, supra,* in light of developments in the area since 1962.

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[3]Perhaps this is because *Griggs* placed the liability for noise on the entity least capable of solving the problem.

[4]*E.g., City of Los Angeles v. Japan Air Lines, Inc., et al.,* wherein the airlines operating at Los Angeles International Airport have taken the position that they may operate uncurtailed at the airport and are not liable in any manner for the consequences of noise. The California Court of Appeal has denied indemnity to the City of Los Angeles in this action. 41 Cal.App.3d 416. The City's petition for hearing to the California Supreme Court has been denied.

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the California Court of Appeal.

Respectfully submitted,

BURT PINES,
City Attorney,

MILTON N. SHERMAN,
Chief Assistant City Attorney,

Counsel for Petitioner.

APPENDIX "A."

Denial of Petition for Hearing by California Supreme Court.

MINUTES

Supreme Court, San Francisco, Aug. 28, 1974.

(2d Civ. 40999, Div. 5)—Aaron, et al. v. City of Los Angeles. [40 C.A.3d 471.] Appellant's petition for hearing denied.

APPENDIX "B."

Opinion of the California Court of Appeal.

Irving D. Aaron et al., Plaintiffs and Respondents, v. City of Los Angeles, Defendant and Appellant. [Civ. No. 40999. Second Dist., Div. Five, July 3, 1974.]

SUMMARY

Following a trial without a jury, the trial court entered judgment holding a city, as owner and operator of an airport, liable in inverse condemnation to owners of residential property in the neighborhood of the airport which was damaged and reduced in market value by the noise from jet aircraft taking off and landing at the airport. Most of the trial was occupied by the testimony of a team of appraisers for plaintiffs who visited the properties of the named plaintiffs, heard the jet noises themselves, and appraised the market values of the property, and what their market value would have been if unaffected by jet noise, based on sales of comparable properties in other areas. (Superior Court of Los Angeles County, No. 837799, Bernard S. Jefferson, Judge.)

The Court of Appeal affirmed. After noting that there is no appellate case in California squarely holding a municipal operator of an airport liable under such circumstances, the court reviewed California decisions implying that result and other authorities, and concluded that the municipal owner and operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft causes a substantial

interference with the use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking. It rejected the city's contentions that plaintiffs had failed to prove substantial damage to their property and that its conduct was not the proximate cause of the claimed damage. The court approved the trial court's finding as to the time of accrual of plaintiffs' cause of action for purposes of the claim filing requirements. It took the view that the cause of action did not accrue at the point where the homeowners first became annoyed, but only when the flights substantially interfered with the use and enjoyment of their properties and resulted in a diminution of their market value. (Opinion by Ashby, J., with Kaus, P. J., and Stephens, J., concurring.)

COUNSEL

Burt Pines, Roger Arnebergh, City Attorneys, Milton N. Sherman, Principal Assistant City Attorney, and John F. Haggerty, Assistant City Attorney, for Defendant and Appellant.

Ellis & Sloan, Lyle C. Ellis and James E. Sloan for Plaintiffs and Respondents.

OPINION

ASHBY, J.—Defendant appeals from a judgment in inverse condemnation in favor of numerous individual plaintiffs following a trial by the court. The issue in this appeal is whether the City of Los Angeles (City), as owner and operator of Los Angeles International Airport (LAX), is liable in inverse condemnation to owners of residential property in the neighborhood of the airport which is damaged and reduced in market

value by the noise from jet aircraft taking off and landing at the airport. The trial court answered this question in the affirmative, and granted judgment against the City with respect to 520 parcels of such property. We have concluded that the trial court was correct and that the judgment should be affirmed.

FACTS

Between 1959, when jet aircraft first began using LAX, and 1965, the City permitted gradually increasing numbers of jet flights to and from the airport.[1] These aircraft emit loud and disturbing noises. An acoustical expert with the consulting firm of Bolt, Beranek and Newman prepared a study for the Federal Aviation Administration entitled "1965, 1970, and 1975 Noise Exposure Forecast Areas for Los Angeles International Airport." The purpose of the study was to determine the effects of aircraft noise on land use in areas surrounding the airport. The effective perceived noise level (EPNL), which measures the annoyance caused by such noise, was determined based on known noise levels of the engines, altitudes, distances, flight paths, and takeoff and landing patterns. Adjustments were made to reflect the number of flights per day and

[1]The number of jet aircraft landing at Los Angeles International Airport was as follows:

Year	Yearly Number	Average Daily Landings
1960	20,171	55
1961	33,932	93
1962	47,215	129
1963	59,776	164
1964	69,503	191
1965	86,855	238

the timing of the flights, since frequent flights and nighttime flights are more annoying to residents. Based on these values three noise exposure forecast (NEF) areas were determined.[2] NEF area C was the one in which jet aircraft noise had the greatest effect upon people below. Single family construction is not recommended in NEF area C because noise is likely to constitute a severe interference with the use of land for that purpose. The bulk of the properties originally involved in this suit are in NEF area C.

A few of the individual plaintiffs testified about the disturbing and annoying effects which the jet noise had on conversations, radio and television viewing and sleep. There was also some testimony that soot, oil and fuel from the aircraft fell on some of the parcels involved causing damage to painted surfaces and preventing homeowners from keeping their cars uncovered or drying clothes in their yards. However, recovery is not sought for the noise and other inconveniences as such, but rather for the diminution in property value caused by them.

Most of the trial was occupied by the testimony of a team of appraisers for plaintiffs. They visited the properties of the named plaintiffs in 1963, heard the jet noise themselves, and prepared appraisals of the properties involved. They appraised the market value of these properties and what their market value would have been if unaffected by jet noise, based on sales of comparable properties in other areas. The trial court determined that 581 of the parcels had been damaged and their

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[2]For a readable explanation of this noise measurement technique, see Comment, *Port Noise Complaint* (1970) 6 Harv. Civ. Rts.-Civ. Lib. L.Rev. 61, 65-74.

market value reduced by the jet noise.[3] The reductions in market value ranged from $400 to $6,000 but were preponderantly in the neighborhood of $1,000. In the judgment the court also granted an easement to the City for flights of jet aircraft in the air space over and near the properties involved, to the extent of such usage in May 1963, which was determined to be the time of the taking or damaging of property in this case.

I

Jet Noise as a Taking or Damaging of Property

There is no appellate case in California that squarely holds the municipal operator of an airport liable in inverse condemnation to the owners of residential property in the vicinity of the airport which is damaged and diminished in market value by noise from jet aircraft landing and taking off at the airport. The subject has been treated by numerous legal commentators, however,[4] and we are guided to our conclusion by prior

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[3]This case originally involved some 750 parcels. The trial court found that some of them had not been damaged. Furthermore, as to 61 of the 581 damaged parcels, the plaintiffs presented inadequate proof of ownership and therefore compensation was granted only as to 520 parcels.

[4]Many useful authorities are collected in *City of Oakland v. Nutter*, 13 Cal.App.3d 752, 761, fn. 7 [92 Cal.Rptr. 347]; and in Berger, *You Know I Can't Hear You When the Planes Are Flying* (1972) 4 Urban Lawyer 1, fn. 3. Additional authorities not listed in those footnotes include Russell, *Recent Developments in Inverse Condemnation of Air Space* (1973) 39 J. Air L. & Commence 81: Vittek, *Airport Noise Control—Can Communities Live Without It? Can Airlines Live With It?* (1972) 38 J. Air L. & Commerce 473; Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica* (1973) 9 Cal. Western L.Rev. 199; Note, *Airport Noise: An Inadequate Judicial Response* (1972) 4 Conn. L.Rev. 634; Spater, *Noise and the Law* (1965) 63 Mich.L.Rev. 1373.

Although the subject was studied by the California Law Revision Commission, the commission decided not to recommend legislation pending clarification by the courts. (10 Cal.L.Rev. Com. Reports 1001, 1013 (1971).)

decisions of the California Supreme Court which imply this result, as well as by other California decisional and statutory law and decisions of the United States Supreme Court and courts of sister states.

In the landmark case of *United States v. Causby* (1946) 328 U.S. 256 [90 L.Ed. 1206, 66 S.Ct. 1062], the Supreme Court held that frequent low flights over the Causbys' land by military aircraft landing at a near-by airport operated by the United States constituted a taking of the Causbys' property without compensation in violation of the Fifth Amendment of the United States Constitution. The noise from the aircraft rendered it impossible to continue the use of the property as a commercial chicken farm. Although the flights did not completely destroy the enjoyment and use of the land, they were held to be so low and frequent as to constitute a direct and immediate interference with the full employment of the land, limiting the utility of the land and causing a diminution in its value, and therefore constituted a taking under the Fifth Amendment.

In the other major Supreme Court decision on this issue, *Griggs v. Allegheny County* (1962) 369 U.S. 84 [7 L.Ed.2d 585, 82 S.Ct. 531], the court held that Allegheny County, which owned and operated the Greater Pittsburgh Airport, was liable for a taking of property under the Fifth Amendment where the noise from taking off and landing at the airport on flight paths over the Griggs' property rendered the property undesirable and unbearable for residential use. The court saw no difference between the county's responsibility to pay for the land on which the runways were built and its responsibility for the air easements necessary for operation of the airport. "The glide path for the

northeast runway is as necessary for the operation of the airport as is a surface right of way for operation of a bridge, or as is the land for the operation of a dam. [Citation.] As stated by the Supreme Court of Washington in *Ackerman v. Port of Seattle*, 55 Wash.2d 401 [*sic* 400], 413, 348 P.2d 664, 671, '. . . an adequate approach way is as necessary a part of an airport as is the ground on which the airstrip, itself, is constructed. . . .' Without the 'approach areas,' an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough." (369 U.S. at p. 90 [7 L.Ed.2d at p. 589].)

A federal circuit court has narrowly interpreted *Causby* and *Griggs* to mean that there is no taking under the Fifth Amendment unless the aircraft invade the air space directly over the plaintiff's property and the property is rendered uninhabitable. (*Batten v. United States* (10th Cir. 1962) 306 F.2d 580, cert. den., 371 U.S. 955 [9 L.Ed.2d 502, 83 S.Ct. 506], rehg. den., 372 U.S. 925 [9 L.Ed.2d 731, 83 S.Ct. 718].) However, several states have interpreted their own constitutions to require compensation under less strict circumstances when the noise from aircraft has diminished the market value of the homeowner's property.

The leading case is *Thornburg v. Port of Portland* (1962) 233 Ore. 178 [376 P.2d 100], *second appeal* (1966) 244 Ore. 69 [415 P.2d 750]. There the Oregon Supreme Court rejected any arbitrary limitations based upon the altitude of the particular aircraft or upon a technical trespass of the air space directly over the homeowner's land. The court held that there could be a taking whenever the government acts in such a way as substantially to deprive an owner of the useful

possession of his property. (*Thornburg v. Port of Portland, supra,* 376 P.2d at p. 106.) In the second appeal the court held: "The proper test to determine whether there has been a compensable invasion of the individual's property rights in a case of this kind is whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a sum certain in money. If so, justice as between the state and the citizen requires the burden imposed to be borne by the public and not by the individual alone." (*Thornburg v. Port of Portland, supra,* 415 P.2d at p. 752.)

Similarly in *Martin v. Port of Seattle* (1964) 64 Wn.2d 309 [391 P.2d 540], cert. den., 379 U.S. 989 [13 L.Ed.2d 610, 85 S.Ct. 701], the Supreme Court of Washington held that there should be no arbitrary distinction between property directly overflown by jet aircraft and that which is not. The court noted that article I, section 16, amendment 9 of the Washington Constitution refers to a "taking" or "damaging" of property (as does art. I, § 14 of the Cal. Const.) and thus is broader than the "taking" provision of the United States Constitution. The court found it unnecessary to become "embroiled" in this distinction, however, because in the prior Washington decision of *Ackerman v. Port of Seattle* (1960) 55 Wn.2d 400 [348 P.2d 664, 77 A.L.R.2d 1344] (quoted by the United States Supreme Court in *Griggs v. Allegheny County, supra*), property was defined to include the unrestricted right to use, enjoy, and dispose of the land, and the frequent flight of aircraft over the land reducing its market value was held to be a compensable taking of an easement.

In *Martin* the court held that where the flights in question caused such interference with the use and enjoyment of the property as to result in a measurable diminishment in market value, the government and not the individual homeowner should be required to bear that burden.

Thornburg was followed in *City of Jacksonville v. Schumann* (Fla.App. 1964) 167 So.2d 95, 99-102, *second appeal* (Fla.App. 1967) 199 So.2d 727, 729, cert. den., 390 U.S. 981 [19 L.Ed.2d 1278, 88 S.Ct. 1101], and in *Johnson v. City of Greeneville* (1968) 222 Tenn. 260 [435 S.W.2d 476, 478-480].

An examination of existing California law suggests that California should adopt an approach similar to that of *Thornburg* and *Martin*.

California's landmark case dealing with the problem of noise from jets taking off and landing at an airport is *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal.2d 582 [39 Cal.Rptr. 708, 394 P.2d 548]. In that case the residents of a neighborhood in the flight path of jet aircraft using Lindbergh Field in San Diego sought to enjoin the airlines from flying at low altitudes in close proximity to plaintiffs' residences in such manner and times as to interfere unreasonably with the normal use and enjoyment by plaintiffs of their homes. The Supreme Court held "that under the facts of this case, i.e., the operation of aircraft with federal airworthiness certificates in federally-certificated, scheduled passenger service, in conformity with federal safety regulations, in a manner not creating imminent danger, and in furtherance of the public interest in safe, regular air transportation of goods and passengers, an injunction is not available." (*Id.*, at p. 591.)

The court stressed, however, that plaintiffs did not seek damages and had not named the operator of the airport as a party. (*Id.*, at pp. 585-586 and fn. 1.) In stating its holding the court emphasized: "Nothing herein is intended to be a determination of the rights of landowners who suffer from airplane annoyances to seek damages from the owners or operators of aircraft or to seek compensation from the owner or operator of an airport." (*Id.*, at pp. 590-591.) The court also stated: "Finally, it is clear, of course, that state courts have jurisdiction to award compensation for a 'taking,' without regard to whether the overflights conform to federal law, when such relief is appropriate." (*Id.*, at p. 594. See also *Anderson v. Souza*, 38 Cal. 2d 825, 838-839 [243 P.2d 497].)

Our Supreme Court faced this problem a second time in *Nestle v. City of Santa Monica*, 6 Cal.3d 920 [101 Cal.Rptr. 568, 496 P.2d 480]. In that case property owners in the vicinity of Santa Monica Airport sued the city for both property and personal injury damages on the ground that vibrations, fumes, and noise from jets landing and taking off at the airport caused damage to their property, interfered with free enjoyment of the property and resulted in pain, suffering and emotional disturbance. They had four theories: (1) inverse condemnation, (2) nuisance, (3) negligence, (4) zoning violations. Only the inverse condemnation count went to trial, and as to it the trial court gave judgment to the defendant on the ground that plaintiffs had failed to prove their property was damaged. The trial court dismissed the other counts, rejecting the nuisance theory on grounds of governmental immunity.

The Supreme Court's opinion does not resolve the question of liability in inverse condemnation which faces us in this case. This is because the trial court had found in favor of the defendant on the issues of excessive noise and diminution in property values, and the Supreme Court merely held that the trial court's finding was supported by substantial evidence. (*Id.*, at pp. 925-928.)

However, the Supreme Court reversed as to the nuisance count, holding that Government Code section 815 does not give immunity to the city for operating an airport in a manner constituting a nuisance. (*Id.*, at pp. 931-937.) The court felt its conclusion was "further supported by the profound interest the 1970 Legislature demonstrated in the eradication of the evils caused by the various forms of pollution, with particular emphasis on noise pollution. Since it is well-documented that a nuisance theory provides an effective means for redress in a wide range of actions resulting from pollution including noise disturbance, it appears that, in deleting the [Law Revision] commission's recommendation to preclude governmental nuisance liability, the Legislature intended to preserve this additional weapon in the arsenal available to combat grievous injury to the environment." (*Id.*, at pp. 936-937; fns. omitted.)

The court's discussion in *Nestle* indicates that public policy does not preclude the imposition of liability on the City in the instant case. There is a very close rela-

tion between the concepts of inverse condemnation and nuisance by a governmental entity.[5]

Another recent case which suggests the result we reach is *City of Oakland v. Nutter, supra,* 13 Cal. App.3d 752. In that case the city brought an action as condemner to acquire an air easement in the air space above described real property for airport purposes, in order to protect the approaches of the airport from hazardous encroachment of structures or vegetable life, pursuant to Code of Civil Procedure section 1239.2. The court held that the noise and other interference with the remaining property engendered by the use of this easement could be considered in determining severance damages. (*Id.,* at pp. 765-775.)[6]

Several California cases have found that zoning restrictions intended to facilitate the operation of an airport and to protect the approaches to it may constitute a taking of property. (Compare *Sneed v. County of*

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[5]Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California* (1969) 16 U.C.L.A. L.Rev. 491, 525, fn. 130; Fadem and Berger, *A Noisy Airport Is a Damned Nuisance!* (1971) 3 S.W. Univ. L. Rev. 39, 48, fn. 35; Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect* (1967) 71 Dickinson L. Rev. 207, 209; *Thornburg v. Port of Portland, supra,* 376 P.2d at pp. 105-107. To date inverse condemnation has been the most successful theory for plaintiffs seeking relief against aircraft noise. Comment, *The Jet-Set and the Law: A Summary of Recent Developments in Noise Law as It Relates to Airport and Aircraft Operations in California* (1970) 1 Pacific L.J. 581, 588.

[6]Mr. Justice Sims' opinion in *Nutter* contains a thorough discussion of authorities relating to many of the issues raised in this case. The question in *Nutter,* however, was narrowly framed in the context of severance damages, and the court was not required to decide several of these issues.

Riverside, 218 Cal.App.2d 205 [32 Cal.Rptr. 318]; *Peacock v. County of Sacramento*, 271 Cal.App.2d 845 [77 Cal.Rptr. 391]; *Kissinger v. City of Los Angeles*, 161 Cal.App.2d 454 [327 P.2d 10]; with *Morse v. County of San Luis Obispo*, 247 Cal.App.2d 600 [55 Cal.Rptr. 710]; *Smith v. County of Santa Barbara*, 243 Cal.App.2d 126 [52 Cal.Rptr. 292].)[7]

(1) We also find support for our conclusion in Code of Civil Procedure section 1239.3. It provides: "Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city, port district, or airport district if such taking is necessary to provide an area in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property located adjacent to or in the vicinity of an airport and any reduction in the market value of real property by reason thereof will occur through the operation of aircraft to and from the airport."

The enactment of section 1239.3 recognizes that the use of air space in which excessive noise interferes with the use and enjoyment of real property in the vicinity of the airport may constitute a taking by the airport. This section was enacted to permit the appropriate governmental bodies to take the initiative in securing rights which might otherwise be subject to inverse condemnation proceedings. (*City of Oakland v. Nutter, supra*, 13 Cal.App.3d 752, 766; Review of Selected 1965 Code Legislation (Cont.Ed.Bar) pp. 88-89.)

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[7]The airport approaches zoning law recognizes that zoning restrictions may in some cases constitute a taking of property. (Gov. Code, §§50485.2, 50485.13.)

Although section 1239.3 was enacted in 1965, after the cause of action arose in the instant case, it is indicative of legislative policy. The court in *City of Oakland v. Nutter, supra,* stated: "The adoption of section 1239.3 does not indicate that the factors set forth therein are not to be considered in an action to condemn under the earlier adopted sections, either before or after 1965."

The City contends that the inconveniences and noise damage suffered by residents near the airport do not amount to a taking of property but instead are merely "consequential" damages which plaintiffs must suffer without compensation. The City relies upon *People v. Symons,* 54 Cal.2d 855, 858-859 [9 Cal.Rptr. 363, 357 P.2d 451], where it is stated (quoting *Eachus v. Los Angeles etc. Ry. Co.,* 103 Cal. 614, 617 [37 P. 750]): " 'The Constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the Constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of the public use. . . .' "

In that case the court held that the homeowner, whose neighbor's property was taken for a freeway and whose own property was partially taken in order to provide a turn around area, could not recover severance damages for such general factors as noise,

fumes and dust from the freeway. Other freeway noise cases are collected and thoroughly analyzed in *People* ex rel. *Dept. Pub. Wks. v. Volunteers of America,* 21 Cal.App.3d 111 [98 Cal.Rptr. 423, 51 A.L.R.3d 844].

As the trial court found, however, the noise from jet aircraft landing and taking off at the airport is a severe disturbance to the enjoyment and use of residential property in the area and is significantly greater than the noise emanating from a freeway. (See Comment, *supra,* fn. 5, 1 Pacific L.J. at pp. 591-592.) In comparing highway and airport noise for this purpose other courts have not treated them as the same. (*Thornburg v. Port of Portland, supra,* 376 P.2d 100, 106; compare *City of Jacksonville v. Schumann* (Fla.App. 1964) *supra,* 167 So.2d 95, 97 with *Northcutt v. State Road Department* (Fla.App. 1968) 209 So.2d 710, 711.)

(2) A property owner may be required to bear without compensation incidental damages which are suffered alike by the public in general, but he is entitled to compensation for special and peculiar damage inflicted upon him. (*Richards v. Washington Terminal Co.* (1914) 233 U.S. 546, 557 [58 L.Ed. 1088, 1093, 34 S.Ct. 654]; Stoebuck, *supra,* fn. 5, 71 Dickinson L.Rev. at pp. 213-214.) In *Richards* the Supreme Court held that a property owner near a railroad track could not recover for the soot and smoke damage suffered generally by all persons along the track, but was entitled to compensation for the special and peculiar damage to his property arising from the fact that an exhaust fan in a tunnel built by the railroad blew additional smoke on his property. (*Id.,* at pp. 555-557 [58 L.Ed. at pp. 1092-1093].) Similarly in this case

the construction and operation of the airport by the City causes special and peculiar damage to plaintiffs which is not shared in common by all persons who live along the airways. (*United States v. Causby* (1946) *supra*, 328 U.S. 256, 262 [90 L.Ed. 1206, 1210].) As stated by our Supreme Court in *Loma Portal Civic Club v. American Airlines, Inc.*, *supra*, 61 Cal.2d 582, 584: "The problems [of noise and vibrations from jet aircraft] are *peculiarly acute for landowners near airports, who suffer not only from the increase in the general noise level but particularly from their proximity to the low-level flying which is a necessary part of takeoff and landing.*" (Italics added.) Plaintiffs' damages are not merely incidental and general. (See *City of Oakland v. Nutter*, *supra*, 13 Cal.App.3d 752, 770, 771.)

Summary

(3a) Drawing upon the above precedents we may state the rule in terms of California law as follows: The municipal owner and operator of an airport is liable for a taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking. (See *Holtz v. Superior Court*, 3 Cal.3d 296, 303 [90 Cal.Rptr. 345, 475 P.2d 441].) Whether the interference is substantial enough to meet this standard is a mixed question of fact and law for the trial judge to determine. (See *Breidert v. Southern*

Pac. Co., 61 Cal.2d 659, 663-664 [39 Cal.Rptr. 903, 394 P.2d 719], *second appeal* 272 Cal.App.2d 398, 409 [77 Cal.Rptr. 262]; *Riverside County Flood etc. Dist. v. Halman*, 262 Cal.App.2d 510, 516-517 [69 Cal.Rptr. 1].)

II

City's Contentions

Direct Overflight Rule

The City contends that plaintiffs may not recover unless they can show their damages result from a physical invasion by the aircraft of the air space directly over plaintiffs' property. (*Batten v. United States* (10th Cir. 1962) *supra*, 306 F.2d 580, 583-585; Spater, *supra*, fn. 4, 63 Mich.L.Rev. at p. 1394.) We reject the *Batten* rule as inappropriate for California. We agree with the statement in *Martin v. Port of Seattle*, *supra*, 391 P.2d at page 545: "We are unable to accept the premise that recovery for interference with the use of land should depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the nearby flights which interfere with the use and enjoyment of their land."

Another commentator has said: "Restricting recovery to damage caused by overflights makes no sense from a scientific standpoint, and postulates an arbitrary line between compensability and noncompensability that defies logical justification. Technical studies demonstrate that the 'noise-affected' area in the vicinity of airports is not confined to the land directly below aircraft approach and departure paths, but extends for a consider-

able distance to each side. . . . Moreover, even relatively minor but consistent deviations from prescribed flight patterns may, under the overflight rule, arbitrarily enlarge or contract the group of property owners who may assert recoverable claims, despite substantially equivalent detrimental effects upon all." (Van Alstyne, *supra* fn. 5, 16 U.C.L.A. L.Rev. at p. 531.)

Modern day noise measurement techniques provide more sophisticated means of drawing the dividing line between compensability and noncompensability.[8]

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[8]This point is forcefully made in the trial court's memorandum opinion as follows: "Since the noise from jet aircraft is capable of acceptable and recognized measurement in terms of its annoyance effect, no reasonable basis exists for making a legal difference between the effects caused by flyby aircraft and the same effects caused by flyover aircraft. Recognition of this principle of equal treatment for the same effects from jet noise is the basis upon which NEF Area 'C' has been designated as the area in which the Effective Perceived Noise Level is such that a substantial interference with residential living results from jet aircraft noise caused by the landings and takeoffs in the vicinity of Los Angeles International Airport.

"It is suggested that unless recovery in inverse condemnation is limited to landowners suffering from flyover aircraft, there will be no reasonable way to draw a line to distinguish between those landowners who would have a cause of action and those who would not. The development of the NEF contour areas provides a good means of drawing a reasonable line between those landowners who may establish a cause of action for inverse condemnation and those who may not. All landowners who suffer from substantially the same noise level are treated on an equal basis. Thus, all landowners located in NEF Area 'C' are subjected to noise from jet aircraft which substantially interferes with residential comfort, enjoyment and use of their property and which is substantiated by the Effective Perceived Noise Level rating in decibels used to delineate NEF Area 'C.' To the extent that they are able to establish that jet aircraft noise has diminished substantially the market value of their property, they should be entitled to recover damages in inverse condemnation. Those owners whose property is located outside of NEF Area 'C' would not ordinarily be entitled to recover because the jet noise in areas outside of NEF Area 'C' does not constitute normally a substantial interference with residential comfort, enjoyment and use of their property."

The Washington Supreme Court in *Martin* concluded that the *Batten* rule is not compelled by *Causby* and *Griggs*. As to those two cases the *Martin* court said: "While a direct overflight or invasion in airspace is in fact involved in each case, it is not clear that the reasoning and approach of those cases is so limited. Realistically, it must be conceded that a major part of the damage in either case was engendered by noise and vibration, whether or not accompanied by a physical displacement of air above the property." (*Martin v. Port of Seattle, supra,* 391 P.2d at p. 545.) Other state courts have stated that the dissent in *Batten* represents the better view. (*Thornburg v. Port of Portland, supra,* 376 P.2d at p. 104; *Johnson v. City of Greeneville, supra,* 435 S.W.2d at p. 479.) The *Batten* rule has been criticized by most commentators.[9]

It should also be remembered that *Batten* is based on the Fifth Amendment of the United States Constitution, which is limited to a "taking" of property, whereas California, like Washington, has a broader provision referring to the "taking" or "damaging" of property. (*Martin v. Port of Seattle, supra,* 391 P.2d at p. 546; Cal. Const., art. I, § 14.)[10]

Finally, the adoption of Code of Civil Procedure section 1239.3, referring to "an area in which excessive noise, vibration, discomfort, inconvenience or inter-

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[9]A collection of commentaries critical of *Batten* may be found in Berger, *supra,* footnote 4, 9 Cal. Western L.Rev. at pages 236-238.

[10]Although we reject the application of strict notions of trespass to the instant case, it may be noted that there is precedent for liability for damage caused by vibrations emitted through the air or the ground. (*Eg., Smith v. Lockheed Propulsion Co.,* 247 Cal.App.2d 774, 784 [56 Cal.Rptr. 128, 29 A.L.R.3d 538]; *McGrath v. Basich Brothers Const. Co.,* 7 Cal.App.2d 573, 576 [46 P.2d 981].)

ference with the use and enjoyment of real property located adjacent to or in the vicinity of an airport," impliedly rejects any requirement of direct overflights. (*City of Oakland v. Nutter, supra,* 13 Cal.App.3d 752, 766.)

Substantial Damage

(4) The City contends that plaintiffs did not prove there was damage to the property in a substantial amount. (*Lombardy v. Peter Kiewit Sons' Co.,* 266 Cal.App.2d 599, 602-603 [72 Cal.Rptr. 240], app. dism., 394 U.S. 813 [22 L.Ed.2d 748, 89 S.Ct. 1486], overruled on another ground, *Southern Cal. Edison Co. v. Bourgerie,* 9 Cal.3d 169, 175 [107 Cal.Rptr. 76, 507 P.2d 964].) However, *Lombardy* was a case which was decided upon the pleadings alone, in which the plaintiffs merely claimed to have sustained damages to real property *and person* in the amount of $5,000, and therefore it was impossible to tell to what extent the property itself was damaged.

In this case, however, the trial court found that the noise from the jet aircraft severely and substantially interfered with the residential use and enjoyment of the properties and founded measurable reductions in market value in the amounts indicated in the judgment. Whether the damage was substantial enough to be compensable is a mixed question of fact and law for the trial court to determine, and the court's implied findings on factual issues will be upheld on appeal if there is substantial evidence to support them. (*Riverside County Flood etc. Dist. v. Halman, supra,* 262 Cal.App.2d 510, 517.) In the absence of specific legislative standards (see Van Alstyne, *supra,* fn. 5, 16 U.C.L.A. L.Rev. at pp. 535-539) we cannot say the damage was insubstantial in this case.

Proximate Cause

(5) The City contends that it should not be liable because it does not build or fly the jet aircraft which make the noise and therefore the City's conduct is not the proximate cause of plaintiffs' damage. (*Albers v. County of Los Angeles*, 62 Cal.2d 250, 263 [42 Cal. Rptr. 89, 398 P.2d 129].) This argument is without merit. The fact that the City plans, builds and operates the airport is sufficient to impose liability. (*Griggs v. Allegheny County, supra*, 369 U.S. 84, 89 [7 L.Ed.2d 585, 589].) The City's operation of the airport need not be the sole cause of the damage. It need only be one substantial cause. (*Holtz v. Superior Court, supra*, 3 Cal.3d 296, 304, fn. 9; *Blau v. City of Los Angeles*, 32 Cal.App.3d 77, 84-85 [107 Cal.Rptr. 727].)

Federal Pre-emption: Navigable Air Space

(6) The City contends that because Congress has declared a public freedom of transit through the navigable air space, and has defined navigable air space to include air space needed to insure safety in takeoff and landing (49 U.S.C.A. §§ 1301, 1304) the City is immune from liability. This is also without merit. The fact that the flights are within the navigable air space does not immunize the owner and operator of an airport for failure to appropriate the land and air space necessary to provide an adequate approach way. (*Griggs v. Allegheny County, supra*, 369 U.S. 84, 88 [7 L.Ed.2d 585, 588]; *Loma Portal Civic Club v. American Airlines, Inc., supra*, 61 Cal.2d 582, 591-

594; *City of Oakland v. Nutter, supra,* 13 Cal.App.3d 752, 763, fn. 12; *Martin v. Port of Seattle, supra,* 391 P.2d 540, 544-545; *Thornburg v. Port of Portland, supra,* 376 P.2d 100, 108.)[11]

Federal Pre-emption: Noise Control

(7) The City contends that the extensive pattern of federal regulation of air transportation pre-empts the field and that "[s]ince it is the Federal Government which controls the airspace it should be their responsibility for what happens as a result of its use." The contention that federal preemption precluded all state activity in aircraft noise control was rejected by our Supreme Court in *Loma Portal Civic Club v. American Airlines, Inc., supra,* at pages 591-594. The court found that the maintenance of an action for damages by the property owners, such as this one, would not conflict with federal law. The court said: "Moreover, we note that noise abatement is a federal as well as a state aim, and when not inconsistent with safety, the enforcement of a damage remedy under a nuisance theory, for example, would not necessarily present a conflict

[11]City attempts to distinguish *Griggs* on the ground that the fact situation there arose prior to the 1958 amendment defining navigable air space to include the air space necessary to insure safe takeoff and landing. This is not persuasive. Even prior to 1958 the air space necessary to insure safe takeoff and landing was controlled by federal regulations. (*Allegheny Airlines v. Village of Cedarhurst* (2d Cir. 1956) 238 F.2d 812, 815; *City of Newark, New Jersey v. Eastern Airlines* (D.N.J. 1958) 159 F.Supp. 750, 756.) The flights in *Griggs* were not in violation of any CAA regulations, yet relief against the county as owner and operator of the airport was granted. (*Loma Portal Civic Club v. American Airlines, Inc., supra,* at p. 594.) The question is considered settled by the authorities cited in the text.

with federal law but might well reinforce it. . . . [¶] Only a compelling federal interest, e.g., where the state-created liability would clearly frustrate federal purposes, justifies our implying an intent on the part of Congress to nullify common-law rights normally in the state-law sphere." (*Id.*, at p. 592.)

The City relies on *Allegheny Airlines v. Village of Cedarhurst* (2d Cir. 1956) *supra*, 238 F.2d 812, affg. (E.D.N.Y. 1955) 132 F.Supp. 871; and *City of Newark, New Jersey v. Eastern Airlines* (D.N.J. 1958) *supra*, 159 F.Supp. 750, cases in which municipal ordinances attempting to regulate the altitude at which aircraft flew over the city were invalidated. As noted in *Loma Portal Civic Club, supra*, at pages 593-594, in both of those cases there was a direct conflict with federal flight control and the courts expressly stated that their decision did not affect the right of property owners to sue for damages.

In *American Airlines, Inc. v. Town of Hempstead* (2d Cir. 1968) 398 F.2d 369, affg. (E.D.N.Y. 1967) 272 F.Supp. 226, cert. den., 393 U.S. 1017 [211 L.Ed.2d 561, 89 S.Ct. 620], the court struck down a municipal ordinance which prohibited the operation of any mechanism which created a noise within the town exceeding a certain level. The court invalidated the ordinance on the ground there was a direct conflict with federal regulations controlling flight patterns and procedures because it was impossible to comply with the ordinance without changing altitudes, flight paths, traffic patterns, and safety margins regulated by the federal government. But the court noted that the case had nothing to do with the question of landowners' right to compensation for overflights which constituted a taking of property. (398 F.2d at p. 372.)

In *City of Burbank v. Lockheed Air Terminal* (1973) 411 U.S. 624 [36 L.Ed.2d 547, 93 S.Ct. 1854], the Supreme Court invalidated a municipal ordinance which prohibited pure jet landings and take-offs from Hollywood-Burbank Airport between 11 p.m. and 7 a.m. The ordinance was invalidated because such curfews, if enacted upon a widespread basis, would result in bunching of flights which would be inconsistent with the federal regulatory scheme. (*Id.*, at pp. 627, 639-640 [36 L.Ed.2d at pp. 550, 557].) The majority opinion went further, however, to declare that section 611 of the Federal Aviation Act, as amended by the Noise Control Act of 1972 (49 U.S.C.A. § 1431) impliedly pre-empted the field of aircraft noise control. (*Id.*, at pp. 628-640 [36 L.Ed.2d at pp. 551-557].)

Nothing in *Burbank* or *Hempstead* suggests, however, that the City of Los Angeles, as owner and operator of LAX, should be absolved of all responsibility for the substantial interference with plaintiffs' use and enjoyment of their property which results from use of the airport. The legislative history of section 611 expressly indicates that it is not intended to "affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport."[12]

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[12]This language is that of the Secretary of Transportation quoted in the Senate Report on the bill adding section 611 to the Federal Aviation Act. In more detail the report states as follows: "The bill is an amendment to a statute describing the powers and duties of the Federal Government with respect to air commerce. As indicated earlier in this report, certain actions by

(This footnote is continued on next page)

In neither *Burbank* nor *Hempstead* was the municipality which enacted the invalid ordinance the owner and operator of the airport which the offending air-

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State and local public agencies, such as zoning to assure compatible land use, are a necessary part of the total attack on aircraft noise. In this connection, the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the committee in recommending this legislation to effect any change in the existing apportionment of powers between the Federal and State and local governments.

"In this regard, we concur in the following views set forth by the Secretary in his letter to the committee of June 22, 1968: 'The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic, American Airlines v. Town of Hempstead, 272 F.Supp. 226 (U.S.D.C. E.D., N.Y., 1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

'However, the proposed legislation will not affect the rights of a State or local public agency, as the proprietor of an airport, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners acting as proprietors can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory.

'Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. The Federal Government is in no position to require an airport to accept service by larger aircraft and, for that purpose, to obtain longer runways. Likewise, the Federal Government is in no position to require an airport to accept service by noiser aircraft, and for that purpose to obtain additional noise easements. The issue is the service desired by the airport owner and the steps it is willing to take to obtain the service. In dealing with this issue, the Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. The proposed legislation is not designed to do this

craft were using. This was noted in *Burbank*, where the court expressly avoided decision as to the powers of a municipality as proprietor of the airport.[13] Likewise the town of Hempstead was not the owner and operator of JFK International Airport in New York. The difference between the power of the town of Hempstead and the power of the Port of New York Authority was noted by the trial court in *Hempstead.* (*American Airlines, Inc. v. Town of Hempstead* (E.D.N.Y. 1967) *supra,* 272 F.Supp. 226, 233.) In *Port of New York Authority v. Eastern Air Lines, Inc.* (E.D.N.Y. 1966) 259 F.Supp. 745, the court upheld the power of the port authority to enforce its own rules and regulations limiting the use of a certain runway in part to abate noise in the community of Jackson Heights.

California law recognizes that a city as owner and operator of an airport has power to make reasonable

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and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.'

"Of course, the authority of units of local government to control the effects of aircraft noise through the exercise of land use planning and zoning powers is not diminished by the bill.

"Finally, since the flight of aircraft has been preempted by the Federal Government, State and local governments can presently exercise no control over sonic boom. The bill makes no changes in this regard." (S.Rep. No. 1353, 90th Cong. 2d Sess. (1968) 2 U.S. Cong. & Admin. News (1968) pp. 2693-2694.)

[13]". . . But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a proprietor." (*City of Burbank v. Lockheed Air Terminal, supra,* 411 U.S. at p. 636, fn. 14 [36 L.Ed.2d at p. 555, fn. 14].)

rules regulating the use of the airport. (Gov. Code, § 50474; *Stagg v. Municipal Court*, 2 Cal.App.3d 318, 322 [82 Cal.Rptr. 578].) California has adopted extensive regulations for the control of noise by airport proprietors. (Pub. Util. Code, § 21669; Cal. Admin. Code, tit. 4, §§ 5000-5080.5; Comment, *We May Yet Have a Quiet Environment: The New California Airport Noise Regulations* (1972) 12 Santa Clara Law. 79; Vittek, *supra*, fn. 4 at pp. 509-514.)

There is no issue in this proceeding as to the validity of California's noise standards or of any rule or regulation adopted by the City as proprietor of the airport. We mention these matters only to suggest that the City is not powerless to take steps to alleviate the problem of jet noise. Indeed, over the years since the problem was brought to the City's attention it has taken several constructive steps to attempt to ease this burden. Obviously a final solution to the problem will require numerous different approaches to it and the cooperation of airplane manufacturers, the airlines, federal, state and local government.[14] Although many parties other than the City may have helped to create the problem, the City's role as planner, owner and operator of the airport is sufficient to require it to compensate the plaintiffs in this case. (*Griggs v. Allegheny County, supra*, 369 U.S. 84, 89-90 [7 L.Ed.2d 585, 589].)[15]

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[14]For one discussion of the multiple strategies available to attack the problem of jet noise see Comment, *supra*, footnote 2, 6 Harv. Civ. Rts.-Civ. Lib. L.Rev. 61. See also Larsen, *Improving the Airport Environment: Effect of the 1969 FAA Regulations on Noise* (1970) 55 Iowa L.Rev. 808.

[15]The record in the instant case does not present the issue as to whether the City has any cause of action against any other parties such as the airlines, aircraft manufacturers, or the federal government.

Statute of Limitations

(8) The City contends that plaintiffs did not timely file claims within one year from the time the cause of action arose. (Gov. Code, § 911.2; *Mosesian v. County of Fresno*, 28 Cal.App.3d 493, 495 [104 Cal.Rptr. 655].) The claims were filed in January and February of 1964. The City contends that the cause of action arose sometime in 1962 and therefore the claims were not timely. The trial court determined that for purposes of Government Code section 911.2 the cause of action arose in May 1963 and thus the statute was satisfied.

The question of when a cause of action arises in a case such as this is a difficult one and the answer necessarily depends upon a number of factors. In *Jensen v. United States* (1962) 305 F.2d 444, 447 [158 Ct.Cl. 333], the court stated, "There is, unfortunately, no simple litmus test for discovering in all cases when an avigation easement is first taken by overflights. Some annoyance must be borne without compensation [citations]. The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life." The determination necessarily depends upon the facts of each case.

The City points to certain evidence that individual plaintiffs were annoyed by the jet noise in 1962 and that they hired attorneys and appraisers in that year. But the cause of action did not accrue at the point the

homeowners first became annoyed. As pointed out in *Jensen* some annoyance must be borne without compensation. It is only when the flights substantially interfered with the use and enjoyment of plaintiffs' properties and resulted in a diminution of their market value that a cause of action arose. (*Aaron v. United States* (1963) 311 F.2d 798, 800 [160 Ct.Cl. 295], *second appeal* (1964) 340 F.2d 655, 658-659 [167 Ct.Cl. 818].)

Moreover, under the decision in *Pierpont Inn, Inc. v. State of California*, 70 Cal.2d 282, 291-293 [74 Cal. Rptr. 521, 449 P.2d 737], which relies in turn upon *United States v. Dickinson* (1947) 331 U.S. 745, 747-749 [91 L.Ed. 1789, 1793-1794, 67 S.Ct. 1382], plaintiffs were not required to sue as soon as the damaging flights began but were entitled to some extent to wait until the situation became stabilized. (See also *Nestle v. City of Santa Monica, supra,* 6 Cal.3d 920, 937.)

In the instant case, the trial court carefully weighed a variety of circumstances including the increase in the number of jet aircraft landings, the increase in the number of fan jet aircraft (which are greatly more annoying than pure jet aircraft), and the effect upon the residents, and determined that the statute of limitations began to run in May 1963. Many of the individual plaintiffs testified that although they were annoyed by the noise in 1962, the frequency of the flights and the damage caused by the noise jumped markedly in 1963. (See *Jensen v. United States, supra.*) There was substantial evidence to support the trial court's ruling that plaintiffs' claims were timely filed.

Since we uphold the trial court's finding that for purposes of the statute of limitations the taking or dam-

aging of plaintiffs' property occurred as of May 1963, there is no merit to the City's contention that the testimony of plaintiffs' appraisers was defective in failing to distinguish decreases in market value which the City contends occurred in 1962. (See *Pierpont Inn, Inc. v. State of California, supra,* 70 Cal.2d 282, 290-294.)[16]

Admissibility of NEF Area Study

(9) The City argues that the trial court should have excluded from evidence the Bolt, Beranek and Newman study of noise exposure forecast areas for LAX, because the earliest portion of that study was for the year 1965, whereas the taking or damaging in the instant case occurred in May 1963. The City contends that the study was therefore irrelevant. This argument is without merit. The NEF area contours were based upon a number of factors including frequency of jet flights, timing of such flights by day and by night, types of jet aircraft, operating conditions and procedures and flight patterns. Although the number of flights increased between 1963 and 1965, the City points to no evidence that the types of aircraft, operating procedures, or flight patterns were substantially different in 1965. That NEF area C was the neighborhood of the most severe impact on land use was substantiated by the testimony of the appraisers. The trial court took the date of the study into account in determining the weight of the evidence. The study was relevant. (Evid. Code, § 210.)

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[16]Another contention raised by the City as to the appraisal testimony is that it should have been stricken as based on speculation. This contention is based on a single remark of one appraiser which he later corrected. There were many days of testimony by the appraisers explaining the reasons for their opinions. The trial court properly denied the motion to strike. (*MCA, Inc. v. Universal Diversified Enterprises Corp.,* 27 Cal.App.3d 170, 178-178 [103 Cal.Rptr. 522].)

III
CONCLUSION

(3b) In summary we hold that the municipal operator of an airport is liable for taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently direct and sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking. Whether the interference is substantial enough to meet this standard is a mixed question of fact and law for the trial judge to determine. The owner need not prove there were direct overflights of the property. The fact that the federal government controls the flight of aircraft does not relieve the airport owner and operator of liability where the operation of the airport is a substantial cause of the property owner's damage.

The judgment is affirmed.

Kaus, P. J., and Stephens, J., concurred.

APPENDIX "C."

Opinion of the Superior Court of the State of California.

Irving D. Aaron, et al. v. City of Los Angeles.

California Superior Court, Los Angeles County, February 5, 1970.

CALIFORNIA — AIRCRAFT NOISE — TAKING OF PROPERTY — DIMINUTION OF VALUE.— The noise from jet aircraft flying over and near residential properties located within and near the landing and takeoff pattern of an airport that resulted in a substantial diminution in the market value of these properties constituted a taking or damaging of these properties within the purview of the state constitution. Since jet aircraft noise creates a severe disturbance to the comfort, enjoyment and use of residential property by the owner, it was not necessary that there be an actual invasion of the landowner's property to constitute a taking. Therefore, to the extent the landowners are able to establish that jet aircraft noise has diminished substantially the market value of their properties they are entitled to recover damages by inverse condemnation.

CALIFORNIA — AIRCRAFT NOISE — SUBSTANTIAL DAMAGE — DIMINUTION OF VALUE.—While property owners must suffer substantial damage from jet noise in order to recover by inverse condemnation, evidence that the market value of their properties has been reduced by jet noise to an extent that is reasonably measurable satisfies the requirement of substantial damage.

CALIFORNIA — AIRCRAFT NOISE — NAVIGABLE AIRSPACE — DAMAGE LIABILITY.— Even though the Federal Aviation Administration es-

tablishes the altitudes at which aircraft may fly in take-offs or in landings, a state may impose liability for damage caused by jet aircraft noise, even if the flights are within the navigable airspace.

Back reference: ¶15,265.64.

CALIFORNIA — AIRCRAFT NOISE — DAMAGE—ACCRUAL.—A cause of action for damages to real property due to aircraft noise accrued at the time the annoyance and offensive features of the noise became stabilized primarily because of the increased use of fan jet aircraft and substantially diminished the market value of the property. Therefore, a cause of action filed within one year was not barred by the statute of limitations.

CALIFORNIA — AIRCRAFT NOISE — DAMAGES—COMPUTATION.—Since the time of the substantial effect upon the market value of property from flyby and flyover jet aircraft noise occurred in 1963, a method of determining the effect of the noise upon the market value in 1963 would be to consider sales prices of property in the affected area in 1961 and 1962 and compare those sales prices with sales prices of comparable property for the years 1963 and 1964.

CALIFORNIA — AIRCRAFT NOISE — COMPENSATION—EASEMENT—An award of compensation for diminution of the market value of residential properties because of flyby and flyover jet aircraft noise carried with it the grant of an easement for such flights. However, if the property owner can subsequently establish a further diminution in the market value by increases in the number of jet flights using the airspace or the character of the noise created, the property owner would be entitled to additional damages.

[*Statement of case*]

Jefferson, Judge: This is an action for damages for inverse condemnation. There are approximately one thousand five hundred plaintiffs who allege that they are the owners of real property in the neighborhood of the Los Angeles International Airport, sometimes hereafter referred to as the Airport, and that the City of Los Angeles, the only defendant in this action, has permitted and caused an increasing number of jet airplane flights over and in the immediate vicinity of the plaintiffs' properties, so that the noise, smoke, vibrations and fumes from the aircraft have damaged these properties. There are approximately seven hundred and fifty separate parcels of real property involved in this action. All of the parcels are residential in nature. Most of these parcels are located east of the airport, with the remainder being located west of the Airport and in the beach area commonly known as Playa del Rey.

Besides denying the allegations set forth in the complaint, the defendant City asserts a number of affirmative defenses. The defenses raised by the defendant are as follows: (1) that the complaint fails to state a cause of action; (2) that the cause of action is barred by the statute of limitations as set forth in sections 312, 318 and 319 of the Code of Civil Procedure; (3) that the action is barred by the statute of limitations as set forth in section 338, subidvision 2, of the Code of Civil Procedure; (4) that the Federal Aviation Act of 1958, as amended, has preempted control of airspace navigation; (5) that the defendant City has acquired by prescription an easement in the airspace involved because of more than five years' adverse use by defendant City; (6) that public convenience and necessity require that defendant City use the airspace involved in this

action, and that the City is entitled to an easement for continued use of this airspace.

A Pretrial Order was made which sets forth the various contentions of the parties, including additional issues to the extent that they are not raised specifically by plaintiffs' complaint and defendant's answer thereto. An important additional issue which has been raised and litigated in this case is the question of whether the plaintiffs are barred from relief by the failure to file a timely claim with the defendant City.

The basic theory of liability which plaintiffs advance is that the noise from jet aircraft flying over and near the residential properties of plaintiffs has resulted in a substantial diminution in the market value of these properties, which thus constitutes a "taking or damaging" of these properties within the purview of Article I, section 14, of the California Constitution.

[*Airport operation*]

It is conceded that the Los Angeles International Airport was in existence at its present location prior to the acquisition by the plaintiffs of their residential properties. The runways of the airport are located in an easterly and westerly direction. Planes landing at the Airport approach the runways from an easterly direction. Planes leaving the Airport do so in a westerly direction and fly out over the ocean. These are the flight patterns of arrivals and departures for most of the days in the year. Occasionally, because of wind conditions, arrivals are directed to come from the west and takeoffs toward the east. The times, however, when these changes are made are rare enough that they need not be given any consideration with respect to the issues involved in this case.

Before the year 1959, planes flying into, and departing from, the Los Angeles International Airport were of the propeller type. The first jet airplanes started using this Airport in 1959, and, since 1959, there has been a gradual, yearly increase in the number of jet aircraft arriving and departing from this Airport. Apparently, there has been little or no complaint from property owners with respect to noise emanating from the propeller-type airplanes. The noise problem developed only with the advent of jet aircraft.

Although there was some testimony that soot, oil and fuel debris from jet aircraft fell on some of the parcels involved in this litigation, causing damage to painted surfaces and preventing homeowners from keeping their cars uncovered and using their yards for clothes drying, the essence of the claimed reductions in market values of property affected is related solely to the noise from the jet plans as the responsible cause.

[*Noise damages*]

Plaintiffs do not seek damages because of any personal injury, discomfort or annoyance. Although the testimony establishes that jet noise interrupted normal conversation, radio and television reception and sleep, at times, no claim is asserted for these results as such. The evidence as to the effects of jet noise upon personal comfort, enjoyment or convenience in living was offered as a factor tending to show that these effects caused a reduction in the fair market value of the respective parcels of real property. What plaintiffs seek in this action are money damages measured by the extent to which the market value of the respective parcels of property has been reduced because of noise

from jet aircraft flying over and near these parcels located within and near the landing and takeoff patterns.

One of the crucial issues involved in this litigation is whether noise from jet aircraft presents a proper case for inverse condemnation. It is the contention of the defendant City that the law does not sanction any recovery for noise against a government entity, even assuming that such noise has caused a diminution in property values. There is yet no appellate court decision in California on this point. The trial courts must chart the theories of recovery or nonrecovery, and ultimately, the California Supreme Court will be asked to determine this aspect of the law of inverse condemnation upon appeals from judgments of the trial courts.

There are various alternatives which may be considered. The federal Constitution provides for the payment of compensation only when there is a "taking" of private property for a public use. Under the federal view, what is meant by the concept of the "taking" of private property? The federal courts have made it clear that there can be no recovery in eminent domain or inverse condemnation proceedings unless the owner of real property has been ousted or displaced by the Government with respect to some portion of his property, with the result that the Government occupies what the owner once occupied or had the right to occupy. Under the federal cases, an injury to property without displacement or ouster of the owner is not compensable.

[*Taking theory*]

With respect to the flight of aircraft and aircraft noise, we have the problem of determining how noise from the flight of aircraft which lowers the market value of property can constitute a "taking" of such property. The federal rule solved this problem by holding that the flight of aircraft over an owner's property constitutes an invasion of the owner's airspace over his surface property, and that this is a sufficient "taking" to permit recovery by the owner who suffers a market-value loss by such overflights. But the federal rule does not allow any recovery to the owner who suffers a loss in market value from horizontal noise, or noise from flyby aircraft, even though it may be as annoying to him as it is to the owner directly over whose property the airplanes are flying. In *United States v. Causby* [2 Avi. 14,189], 328 U.S. 256 (1946), the United States Supreme Court held that flights on takeoff and landing at low level over an owner's property could be considered a "taking" in the nature of an easement of flight, and rendered the Government liable for the decreased value of the owner's property. In *Causby*, the court made it clear that this decision was being limited to permitting recovery by a property owner over whose land the planes took off, and could not be considered as a holding to protect nearby owners. The nearby owners are considered to have suffered incidental damage for which no recovery is allowed.

In *Batten v. United States* [8 Avi. 17,101], 306 F. 2d 580 (10 Cir. 1962), plaintiffs whose property values were depreciated by the noise from jet aircraft *near their* properties, but which were not subject to direct overflights, sought damages from the Government under the theory that there was a "taking" of their property which was compensable under the federal Constitution. The majority of the court followed *Causby* and held that damage from lateral flight noise was not a "taking" by the Government. Plaintiffs were thus denied recovery.

[*Nuisance theory*]

A second view would permit recovery in inverse condemnation by property owners who suffer *substantial* diminution in market value from jet aircraft noise, regardless of whether the planes fly directly over the owner's property or not. Under this view, it is recognized that there can be no acceptable theory of a "taking" of the owner's property under such circumstances. This second view permits recovery on a nuisance theory, which requires substantial damage to the property owner. Is there any basis for sustaining such a view under a state constitutional provision which provides for compensation only when there is a "taking" of property by a governmental entity? This view of recovery is sanctioned in the State of Oregon. This was the holding in *Thornburg v. Port of Portland* [8 Avi. 17,281], 233 Ore. 178, 376 P. 2d 100 (1962). In *Thornburg*, the plaintiffs owned property near an airport which was owned and operated by a public agency, the Port of Portland. Oregon's Constitution is similar to the federal Constitution, and provides for compensation only for a "taking" of private prop-

erty by governmental action. The damage to property values alleged came from noise from horizontal flights, or flyby aircraft, rather than from vertical flights, or flyover aircraft. The Oregon court rejected the federal rule set forth in *Causby* of limiting recovery to cases of noise from vertical flights, or flyover aircraft, which may be explained as a trespass theory, which gives the Government an easement right. The Oregon court adopted a nuisance theory, which permits recovery for damages so long as there is proof of real injury, whether resulting from noise coming from flyover or flyby aircraft.

However, in a second appeal in *Thornburg v. Port of Portland* [9 Avi. 18,248], 244 Ore. 69, 415 P. 2d 759 (1966), the Oregon court, although seemingly rejecting the nuisance theory of recovery enunciated by it in the first appeal, did, nevertheless, clarify what was required to be established by a landowner in order to recover damages for inverse condemnation. The court said, "The proper test to determine whether there has been a compensable invasion of the individual's property rights in a case of this kind is whether the interference with use and enjoyment is sufficiently direct, sufficiently peculiar, and of sufficient magnitude to support a conclusion that the interference has reduced the fair market value of the plaintiff's land by a certain sum in money. If so, justice as between the state and the citizen requires the burden imposed to be borne by the public and not by the individual alone." (*Thornburg, supra,* 415 P. 2d at p. 752.) See Murrah, C. J., dissenting, *Batten v. United States* [8 Avi. 17,101], 306 F. 2d 580, 587 (10 Cir. 1962).

[*Public benefit theory*]

A third view is a further extension of the Oregon rule. The Oregon view requires proof of substantial damages. This third view permits recovery for any damage, whether substantial or not, which results to the property owner from aircraft noise, regardless of whether the noise comes from flyover or flyby aircraft. This view is espoused by the State of Washington. In *Martin v. Port of Seattle* [8 Avi. 18,324], 64 Wash. 2d 324, 391 P. 2d 540 (1964), plaintiffs were property owners near the Seattle-Tacoma International Airport owned and operated by the Port of Seattle, a municipal corporation. Some of the plaintiffs were located underneath the flight patterns, while others were not directly underneath but were near the flight patterns, and all claimed a decrease in property values from the jet noise. Here the question was whether the plaintiffs' complaint which set forth these facts stated a cause of action. The Washington Constitution contains a clause which requires compensation for "taking" or "damaging" private property by governmental action. The Washington court held that plaintiffs' complaint stated a cause of action. The court rejected as purely legalistic any theory of trespass or easement or a limitation of recovery to invasion of airspace above an owner's property. The court adopted the view of the dissent in *Batten v. United States,* cited *supra,* that there should be compensation whenever the interference with the use of an owner's land is of sufficient directness, peculiarity and magnitude "that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone." (*Martin, supra,* 391 P. 2d at p. 546.) However, the Washington court refused

to accept the principle that the plaintiffs must make a showing that their damage is substantial before the damage can be said to be a taking or damaging within the meaning of the constitutional language. The Washington court rejected the view that less-than-substantial damage would be considered noncompensable as incidental damage, holding that any diminution of property values, however slight, should be compensable.

[*California theory*]

We now turn to the law of California to determine if California has embraced a particular theory for recovery in airport noise cases. We start with a consideration of the street or freeway noise cases. To date, California has taken the view that a property owner whose property has not been taken for freeway or street purposes, but whose property has been decreased in value from the vehicular noise of a freeway or street, may not recover from the governmental entity any damages for such decrease in property values. This was the holding in *People ex rel. Dept. of Public Works v. Symons*, 54 Cal. 2d 855 (1960). In *Symons*, the court quoted from *Eachus v. Los Angeles, etc., Ry. Co.*, 103 Cal. 614, 617 (1894), as follows:

> "'The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage con-

templated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable by reason of public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable, but this is not any injury to the property itself so much as an influence affecting its use for certain purposes. . . .' "

To the same effect is *People ex rel. Dept of Public Works v. Elsmore*, 229 Cal. App. 2d 809 (1964).

A more recent case in point is *Lombardi v. Peter Kiewit Sons*, 266 Cal. App. 2d 599 (1968), where it was held that a complaint did not state a cause of action in inverse condemnation. The complaint alleged that the plaintiffs were property owners next to a freeway, and that the building and operation of the freeway resulted in fumes, noise, dust, shocks and vibrations, causing mental, physical and emotional distress to the plaintiffs and damage to the real property. The court held that this complaint did not state a cause of action in inverse condemnation because no recovery may be had unless damage in a substantial amount to the property itself has been sustained. *Lombardi* cites as authority for its holding the cases of *Albers v. County of Los Angeles*, 62 Cal. 2d 250 (1960); and *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345 (1963).

In the *Albers* case, we have a situation in which the county construction of a road caused land slippage and damage to neighboring property owners. The Supreme Court upheld the trial court in giving judgment

for damages in inverse condemnation against the County and in favor of the landowners.

In *Albers*, the California Supreme Court interpreted the California constitutional provisions with respect to eminent domain to permit recovery for any actual physical injury to a landowner's property caused by the improvement. The court distinguished the situation presented in *Albers* from that presented im *Symons* by pointing out that in the latter instance the diminution in property values resulting from such factors as highway traffic noise does not involve any direct physical damage to the property itself but only a diminution in the enjoyment of such property.

[*Physical invasion*]

Albers states the California law as going beyond the federal cases. The theory of the federal cases requires a physical invasion of realty by the governmental entity. This is a trespass theory, which requires an ouster of the owner of possession of some part of his property, whether it be the surface of his land or the airspace above. This physical invasion theory is the exclusive test under federal law. *Albers* can hardly be said to involve a trespass or a physical invasion of the landowner's property by the governmental entity. The emphasis in *Albers* is upon physical injury or damage to the realty. If there can be recovery for physical damage to realty without any actual trespass upon or physical invasion of the landowner's property by the governmental entity, it would seem to follow that an invasion of the air surface above the land by aircraft overflights would be sufficient to permit recovery in inverse condemnation, so long as there has been a loss in market value resulting from such aircraft over-

flight noise. It should be immaterial whether a loss of market value from aircraft overflight noise is looked upon as a "taking" or "damaging" of private property, since the California Constitution provides for eminent domain compensation where there is a "taking" or "damaging." (See California Constitution, Article I, section 14.)

A more serious question, however, is whether the California cases, such as *Albers, Lombardi* and *Symons,* restrict recovery in inverse condemnation in the aircraft noise situation to those cases in which the market value of private property has been diminished by noise from aircraft flyovers. The question to be determined is whether the rule of *Symons* means that aircraft noise falls in the same category as freeway motor vehicle noise, so that in the absence of an invasion of some portion of an owner's property, no recovery may be had for a decrease in market value due to noise, fumes, soot or vibrations of flyby jet aircraft as distinguished from flyover jet aircraft. Is there any rational basis for distinguishing freeway noise effects from jet aircraft noise effects?

One justification for the *Symons* rule in freeway noise cases is that property owners in the same position are treated equally. Thus, all property owners adjacent to the freeway are treated equally in not being permitted to recover for any loss of market value due to freeway noise or fumes. Such owners may logically be set apart from those whose property is actually taken by freeway construction, because the property owner whose property is actually taken is ousted and deprived of possession of that portion of his property. In the case of jet aircraft noise, however, it is pure fiction to

claim that property owners directly under the flight pattern have been ousted from the use of the airspace above their properties by the flyover aircraft. In the case at bench, for example, the property owners whose properties are subject to flyover jet aircraft are still in possession and use of their single-family and multiple-unit properties to the same extent as are the owners who suffer from jet aircraft flyby noise only.

The theory of a "taking," enunciated by the federal cases, is deemed necessary because of the federal constitutional provision that a "taking" must occur in order to permit recovery from the Government. Since the California Constitution provides for compensation for a "damaging" of private property as well as for a "taking" of private property, California is not required to adopt the tenuous theory of the Federal courts that an invasion of a landowner's property is necessary before a "taking" takes place. *Albers* leads the way to this result, since in *Albers* there was physical damage to the citizen's property but no real invasion or appropriation of space by the County.

There is every reason to believe that the citadel of *Symons* must crumble and fall in the face of changing conditions created by the advent of jet aircraft. The *Symons* rule must be restricted in its application to the narrow factual situation presented in that and similar cases. In addition to *Albers*, other California Supreme Court decisions leave little doubt as to the demise of the *Symons* doctrine in other factual contexts. In *People ex rel. Dept. of Public Works v. Ramos*, 1 Cal. 3d 261 (1969), *Symons* was distinguished, and any implications to the contrary found in *People ex rel. Dept of Public Works v. Elsmore*, 229 Cal. App. 2d 809

(1964), were disapproved. But of greater significance is the language found in *Loma Portal Civic Club v. American Airlines, Inc.* [9 Avi. 17,156], 61 Cal. 2d 582 (1964), a case in which property owners sought an injunction against various airlines to prohibit annoying flight operations over their lands. Damages were not sought against the owner and operator of the airport. Although denying the injunctive relief sought, the court made this highly significant observation:

> "Nothing here is intended to be a determination of the rights of landowners who suffer from airplane annoyances to seek damages from the owners or operators of aircraft or to seek compensation from the owner or operator of an airport."
> (*Loma Portal Civic Club, supra,* at p. 591.)

[*Noise measurement*]

Furthermore, there is a significant difference between the noise emanating from jet aircraft and that coming from automobiles and trucks on a street or freeway. This difference is so pronounced that the legal consequences of jet noise should not be the same as the legal consequences of street and freeway noise of cars and trucks as enunciated by cases such as *Albers, Lombardi* and *Symons.* Scientific studies demonstrate that jet aircraft noise creates a severe disturbance to the comfort, enjoyment and use of residential property by the owners affected. The sounds emanating from cars and trucks on streets and freeways are simply minor contrasted with the irritating and offensive sounds emanating from jet aircraft. Scientific evaluation of sound and noise establishes a significant difference between the two types of sounds and noises and their effects upon human beings. Studies made by acoustical scientists

and experts establish that the comparative offensiveness of different sounds is capable of measurement by accepted standards of numerical ratings.

Noise is simply one type of sound. Noise is commonly considered as unwanted sound because of the ear's reception and reaction to different kinds of sounds. In dealing with noise, whether it be from automobiles or aircraft, we are concerned with its annoyance and offensive effect upon people, and whether such noise results in a substantial interference with the comfort, enjoyment or use of one's home.

There are two components of sound in terms of the ear's reception and reaction. One is the intensity, magnitude or loudness of sound, and the second component is the frequency band or frequency range of sound. The high frequency components of sound are the elements which disturb human sensitivities. Although intensity or loudness is also involved in the human judgment of offensiveness, the high frequency aspect of sound creates, by far, the greater irritating effect upon human beings. Thus, the screech of crayon upon a blackboard is a typical example of significant annoyance from a high frequency sound of low intensity or loudness.

The hue and cry over aircraft noise did not develop until the coming of jet aircraft. The explanation is that propeller aircraft creates sounds that are predominantly in the low frequency range, and low frequency sounds are not as disturbing to the ear as are high frequency sounds. Likewise, the sounds from automobiles and trucks traversing the streets and freeways are predominantly low frequency or low pitch sounds, and hence do not begin to have the annoyance and offensive

consequence to the human ear as the high frequency sounds made by jet aircraft. Tests conducted by acoustical experts indicate that if the average person hears two sounds of the same intensity or loudness and one is a high frequency sound and the other a low frequency sound, such person will believe that the high frequency sound is louder than the low frequency sound.

The sound frequencies, or the differences in high pitch tones or low pitch tones, are measured by the number of vibrations or cycles per second. The intensity or magnitude or loudness of sound is measured in terms of a logarithmic scale of decibels. The sound or noise from jet engines creates what is called a broad band noise in the sound spectrum. An orchestra with all of its instruments playing represents a picture of a broad band sound spectrum. That is, the flutes and piccolos make high frequency sounds, while the tubas, bases and cellos create low frequency sounds. The broad band sound of jet engines produces tones of various frequencies. However, the dominant tones of jet engines are in the high frequency range. It is this factor of the concentration of jet noise in the high frequency portion of the sound spectrum which creates the disturbing and annoying feature to the ear.

Acoustical experts have developed the term "Effective Perceived Noise Level," abbreviated EPNL. Effective Perceived Noise Level represents a noise scale which provides a means for comparing the relative noise content of sounds on the basis of the two components, intensity and frequency. The EPNL rating of noise sounds represents the annoyance or offensive value which hearers place on the noise spectrum. It represents the hearer's interpretation of the sound spectrum. It is

a conversion of a physical measurement of sound in terms of frequency in cycles per second and intensity in decibels to a hearing interpretation of sound. Sound experts rate noise with an EPNL single numerical number in decibels, which represents the individual's reaction or annoyance to the particular sound spectrum. The higher the EPNL rating, the greater the annoyance feature of the noise which is translated into the EPNL rating. The EPNL numerical rating, which is expressed in terms of decibels, fixes a value which takes into account, where jet aircraft are concerned, factors such as the duration of the particular sound, the number of flights, whether the flights are daytime or nighttime flights, and the type of aircraft engine, such as the fan jet engine or the pure jet engine.

[*Annoyance features of aircraft noise*]

What are the annoyance or offensive features of noise? One of the important considerations is the influence of noise upon the ability of persons to communicate with each other. If the noise is such that persons engaged in conversation must talk louder to be heard, or get closer together to be heard, or cease talking altogether, then the noise has clearly interfered with normal communication between persons in a home. Interference with normal communication may also be considered in terms of its effect upon telephone conversations and the ability to hear and enjoy radio and television programs. Another annoyance feature of noise is involved if there is an interruption of a person's sleep.

The physical factors which go into the calculations to arrive at an EPNL rating are obtained in part from field tests, which record by means of instruments and

cameras the jet noise from flyover and flyby aircraft at various land points in the takeoff and landing patterns. The EPNL value determined at a particular land location takes into consideration factors such as the altitude of the aircraft and its distance from the land location as it approaches and leaves the specific location on its flight, and duration of the sound, the type of sound produced by different types of aircraft and the number of flights of different types of aircraft per day and night.

The reason that the number of operations per day of jet aircraft is important in a determination of the EPNL rating of jet aircraft noise is that if the noise of a single aircraft is such that it interferes with normal communication in a home, an increase in the number of flights thereby increases the chances of an interference with normal communication, and hence increases the annoyance effect of jets. Thus, several flights a day of jet aircraft may constitute little interference with normal communication. But if there are hundreds of flights per day, the interference with normal communication obviously becomes substantial.

[*Noise exposure study*]

An expert in applied acoustics and aircraft and vehicle noise sound measurements testified for the plaintiffs. This expert was the co-author of a study made by the firm of Bolt, Beranek and Newman, Inc., for the Federal Aviation Administration. The study was made to determine Noise Exposure Forecast areas resulting from aircraft takoff and landing operations at the Los Angeles International Airport for the year 1965. The purpose of the study was to determine the effects of aircraft noise upon various land uses in areas surrounding

the Los Angeles International Airport. To what extent is commercial use of land different from residential use insofar as aircraft noise is concerned? Determination of the effects of jet noise upon different land usages furnishes a good guide to better land-use planning and zoning in areas surrounding an airport. The Noise Exposure Forecast areas, hereafter referred to as NEF areas or contours, were determined and based upon aircraft noise measured numerically in terms of Effective Perceived Noise Levels, and which thus took into consideration factors such as the number of jet flights per day as compared to the number at night, the various types of jet aircraft, operating conditions, such as takeoff and landing thrust and performance and the altitudes of aircraft at various locations in the takeoff and landing patterns.

The NEF areas delineated as a result of the study constitute a measuring of the noise environment surrounding the Los Angeles International Airport, using the EPNL standard of measurement. The study resulted in the designation of three NEF areas or zones. An inner zone, designated NEF Area "C," constitutes a zone of the highest noise level, in which jet aircraft would have the greatest impact on people living within that area. An outer area, designated NEF Area "A," was the zone of the lowest noise level, in which it was determined that there should be no annoyance from aircraft noise to the persons living in that zone. In between these two NEF areas was a third zone designated NEF Area "B." The middle zone was one in which it was concluded that it would be difficult to predict to what extent persons living in that area would be affected by jet aircraft noise.

In the zone designated NEF Area "C", it was the recommendation of the authors of the study that no new single-family residences or apartment houses should be constructed because of the severe noise impact from jet aircraft upon residential living in this area.

In the zone designated NEF Area "B," the opinion was that apartment house construction could be permitted with adequate soundproofing, but that new single-family construction should *generally* be avoided. So far as noise levels are concerned, the expert witness indicated, that there was a 15 decibel difference in noise level rating resulting from jet aircraft between NEF Area "A" and NEF Area "C." In other words, in NEF Area "C," where jet aircraft noise had its greatest annoyance value to residents, the EPNL rating was 15 decibels higher than the noise level in NEF Area "A," where there should be no substantial effect upon residential living. The three NEF area depict, therefore, areas of significant difference in terms of the deleterious effects of aircraft noise. The 15 decibel difference between an area seriously affected by jet aircraft noise and an area not materially affected has significance because of the accepted principle that an increase of 10 decibels in the Effective Perceived Noise Level rating corresponds to a doubling of the annoyance effect upon persons subjected to a noise level increase of 10 decibels.

For the purpose of the case at bench, a profile map delineating the NEF Areas "A," "B" and "C" was superimposed on geodetic maps so that the location of the approximately seven hundred and fifty parcels of property involved in this litigation could be determined with reference to the three Noise Exposure Forecast areas.

The study of the impact of aircraft noise upon land use in the vicinity of the Los Angeles International Airport takes into account the effect of aircraft noise upon land users who are directly under flight paths and also those who are to the side of flight paths. The NEF areas recognize that persons to the side of aircraft flying at an altitude of two hundred feet, for example, may be affected by the jet noise to an even greater degree than one whose land is immediately under a flight path at an altitude of five hundred feet. For example, the noise created by jet flyby aircraft at a lower altitude may produce an EPNL rating of 117 decibels while the noise from jet flyover aircraft at a higher altitude would produce an EPNL rating of 112 decibels, a significant difference. Thus, some residents who suffer only from jet flyby noise are more seriously affected in terms of annoyance and property market value depreciation than other residents who suffer from jet flyover noise.

[*Equal treatment of landowners*]

Since the noise from jet aircraft is capable of acceptable and recognized measurement in terms of its annoyance effect, no reasonable basis exists for making a legal difference between the effects caused by flyby aircraft and the same effects caused by flyover aircraft. Recognition of this principle of equal treatment for the same effects from jet noise is the basis upon which NEF Area "C" has been designated as the area in which the Effective Perceived Noise Level is such that a substantial interference with residential living results from jet aircraft noise caused by the landings and takeoffs in the vicinity of Los Angeles International Airport.

It is suggested that unless recovery in inverse condemnation is limited to landowners suffering from fly-over aircraft, there will be no reasonable way to draw a line to distinguish between those landowners who would have a cause of action and those who would not. The development of the NEF contour areas provides a good means of drawing a reasonable line between those landowners who may establish a cause of action for inverse condemnation and those who may not. All landowners who suffer from substantially the same noise level are treated on an equal basis. Thus, all landowners located in NEF Area "C" are subjected to noise from jet aircraft which substantially interfers with residential comfort, enjoyment and use of their property and which is substantiated by the Effective Perceived Noise Level rating in decibels used to delineate NEF Area "C." To the extent that they are able to establish that jet aircraft noise has diminished substantially the market value of their property, they should be entitled to recover damages in inverse condemnation. The owners whose property is located outside of NEF Area "C" would not ordinarily be entitled to recover because the jet noise in areas outside of NEF Area "C" does not constitute normally a substantial interference with residential comfort, enjoyment and use of their property.

The testimony of the appraisers for the plaintiffs substantiates the findings of the acoustical expert whose studies produced the suggested NEF Areas "C," "B" and "A." Without being aware of these areas, the appraisers testified that at the various locations of most of the parcels involved in this suit they heard the noise of the planes, felt vibrations at some locations, and observed the nearness of the planes and their fly-over or flyby routes. Even though it is coincidental, it

turns out that the bulk of the parcels of real property involved in this lawsuit is located in the area or zone designated as NEF Area "C."

One of the reasons advanced by those who favor limiting recovery to those landowners who are in the overflight patterns only is that of administrative convenience. Unquestionably, administrative convenience is served by a rule of law that can be easily administered by the courts. To hold that the right to possession of real property is the sole constitutionally protected interest in real property does have administrative convenience in its favor. However, since the Effective Perceived Noise Level rating offers a comparative measure of annoyance and offensiveness for areas subjected to the same kind of flight operations, the use of such a standard is not ruled out through administrative inconvenience. On the contrary, the Effective Perceived Noise Level rating scale offers a practical means for comparing noise environments. Conditions which occur immediately below the line of flight appears also at lateral points along the surface. The Effective Perceived Noise Level scales permit the making of practical noise estimations and depicting this situation by contour maps of the surface. This has been done through the development and delineation of NEF Area "A," "B" and "C" with respect to land adjacent to and near the Los Angeles International Airport.

[*Legislative support*]

The view of this Court that landowners who are damaged by noise from flyover or flyby aircraft should have a cause of action for inverse condemnation receives support from legislation enacted by the California Legislature. Section 1239.3 was added to the Code of

Civil Procedure in 1965. This section provides that a condemning agency, such as a city or airport district, may acquire airspace or an air easement in the airspace above the surface of property in the vicinity of an airport in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property produces a reduction in the market value of real property and occurs because of the operation of aircraft to and from an airport.

Prior to the addition of section 1239.3, the power to condemn airspace and air easements was granted to condemning agencies operating airports only to protect runway approaches from encroachment of structures or vegetation. Section 1239.3 is a legislative recognition of the principle that jet aircraft noise may be such that a landowner's property adjacent to an airport may be decreased in market value by reason thereof and result in a cause of action for damages for inverse condemnation. Section 1239.3 is significant because it does not, by its terms, limit the power of condemnation to the airspace in which overflights occur. Thus, this section appears to constitute a legislative recognition that landowners whose properties are reduced in market value by noise from jet flyby aircraft are entitled to consideration to the same extent as those who are affected by the noise from jet flyover aircraft.

[*Substantial damage*]

Objection was made to the testimony of the expert who developed the NEF contour areas "C," "B" and "A" on the ground that his testimony pertained to the aircraft noise situation as it existed in 1965, whereas the thrust of plaintiffs' cause of action related to the aircraft noise situation in the year 1963. It is true that

the 1965 noise problem would not be identical with the 1963 situation. The evidence indicates that in 1965 there were 113,061 jet landings at the Los Angeles Airport, inclusive of propeller jets, and that of this total number 86,855 were pure jet aircraft. In 1963, the total number of jet landings, inclusive of propeller jets, was 76,724, of which 59,776 were pure jet aircraft. The difference between the number of pure jet aircraft in 1965 as compared with 1963 is not so great that the 1965 study lacks significance for 1963 conditions. The increase in the number of jet flights in 1965 over 1963 would indicate an increase in the annoyance factor of jet noise between the two years, but such increase is not of sufficient quantity to materially change the jet noise annoyance effect of 1963. To state the matter in reverse, as will be discussed *infra,* the number of jet flights to and from the airport in 1963 was large enough to create a substantial interference with the comfort, enjoyment and use of residential property situated within NEF Area "C."

The land area described as NEF Area "C" consists of portions of the cities of Los Angeles, Inglewood, El Segundo and unincorporated Los Angeles County territory. That portion of NEF Area "C" east of the Airport is in the shape of a wedge, and may be generally described as follows: The narrowest and most distant point east of the Airport begins at Avalon Boulevard and Golden Avenue, and then stretches in a generally southwesterly direction toward the Airport. There is a gradual widening of NEF Area "C" from Golden Avenue and Avalon Boulevard to the Airport. This gradual widening results from the fact that airplanes are gradually descending as they approach the Airport for their landing. At Vermont Avenue, the northerly bound-

ary of NEF Area "C" is approximately at 94th Street, and its southern boundary is approximately at 103rd Strect. At Western Avenue, the northern boundary is approximately at 95th Street, and the southern boundary is approximately at 105th Street. At Crenshaw Boulevard, the northern boundary is approximately at 98th Street, and the southern boundary is approximately at 108th Street. At Hawthorne Boulevard and La Brea Boulevard, which are extensions of each other, the northerly boundary is approximately at 99th Street, and the southern boundary is approximately at 110th Street. At the San Diego Freeway, the northerly boundary is approximately at 99th Street, and the southern boundary is approximately at 111th Street.

The northerly boundary of NEF Area "C" to the west of the Airport is approximately along a line just south of Waterview Street and just north of Napoleon Street in the Playa del Rey community. The southerly boundary of NEF Area "C" to the south and west of the Airport is approximately at Mariposa Avenue in El Segundo.

The view of many courts, regardless of the theory of recovery, is that property owners must suffer substantial damage from jet noise in order to recover for inverse condemnation. This was the view enunciated by the Oregon court in the first appeal in *Thornburg*, which adopted a nuisance theory and permitted recovery by property owners who suffered damage from jet aircraft noise, whether the noise came from flyover aircraft or flyby aircraft. How is substantial damage to be defined? The cases dealing with the law of nuisance do not indicate any clear concept of what is meant by substantial damage. A reasonable view is one which holds that damage is substantial if it is measurable as

contrasted with that which is merely nominal. Under this view, no particular dollar amount or percentage of reduction in the market value of property from jet noise is required for proof of substantial damage. Evidence that the market value of real property has been reduced by jet noise to an extent which is reasonably measurable satisfies the requirement of substantial damage.

[*Federal preemption*]

One of the defenses raised by the defendant City is that the Federal Aviation Act of 1958 has preempted for the federal government the control and regulation of the use of navigable airspace. The Federal Aviation Act of 1958, as amended, declares that there exists in behalf of the citizens of the United States a public right of freedom of transit through the navigable airspace of the United States. This act defines "navigable airspace" to be the "airspace above the minimum altitudes of fight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft." (48 U. S. C. § 1301(24).) Defendant City correctly points out that it has no control over setting the aititudes at which aircraft may fly in takeoffs or in landings. However, the fact that the federal government establishes the altitudes of flight does not answer the question of whether state law may impose liability for damage caused by jet aircraft noise. In *Aaron v. United States* [8 Avi. 17,421], 311 F. 2d 798 (Ct. Cl. 1963), the federal court indicated that a right of recovery for damage from aircraft flyover noise was limited to flights below the navigable airspace designated by Congress. The theory that there can be no taking of private property and hence no liability for noise from aircraft

within the designated airspace was considered to be derived from the precedents existing for highways. Every citizen is entitled to use the highways, regardless of the noise made by his automobile. Similarly, it was said that citizens should be entitled to fly in the navigable airspace without liability. It is obvious that airplanes must fly at low altitudes for a certain distance adjacent to the runways upon making a landing and upon takeoff. If we accept the defendant City's contention, it would mean that the only liability for aircraft noise, regardless of the amount of damage in terms of diminution in market value, would come from aircraft which flew at lower altitudes than those designated. In *Aaron,* although the federal court accepted the preemption theory generally, it rejected the contention of immunity for flights within the navigable airspace at least to the extent of stating that a property owner's constitutional rights would have to be considered if it could be shown that a property owner suffered substantial impairment of his property rights from aircraft flights within the designated navigable airspace. With respect to state law imposition of liability, it could be reasonably asserted that if an owner's property is destroyed or damaged by aircraft noise, any immunity granted by Congress would be null and void because it would constitute a taking or damaging of private property without due process of law guaranteed by the Fourteenth Amendment to the United States Constitution.

State courts have rejected this theory of federal preemption for aircraft flying within the navigable airspace. In *Thornburg,* the Oregon court rejected the doctrine of federal preemption creating an immunity from liability on the ground that such immunity is predicated

on the view that there can be no trespass from planes flying in the navigable airspace, and, without a trespass, there can be no damage to the landowner. Since the Oregon court rejected the trespass and taking theory and relied upon a nuisance theory for recovery, it concluded that the nuisance theory would permit recovery for damage to property from aircraft noise even if flights are within the navigable airspace designated pursuant to congressional legislation. In *Anderson v. Souza* [3 Avi. 17,887], 38 Cal. 2d 825, 839 (1952), it was stated that the federal declaration with respect to navigable airspace was "not intended to and do not divest owners of the surface of the soil of their lawful rights incident to ownership."

In *Loma Portal Civic Club v. American Airlines, Inc.* [9 Avi. 17,156], 61 Cal. 2d 582 (1964), the California Supreme Court again rejected the contention of federal preemption. The *Loma Portal Civic Club* case determined that Congress had not indicated any intent to establish a federal preemption policy so that state action would be precluded because of an extensive pattern of federal regulation in the field. The court said that Congress had not indicated such a federal preemption because the Federal Aviation Act contained an express declaration that nothing therein contained should, in any way, abridge or alter remedies existing at common law or by statute. The court also reached the conclusion that there was no federal preemption by applying the test of whether the enforcement of state law would conflict with the purposes of the federal legislation, whether by frustrating an affirmative purpose or by interfering with a matter left intentionally unregulated by Congress. The court concluded that only a compelling federal interest, as where a state-

created liability would clearly frustrate federal purposes, would justify inferring an intent on the part of Congress to nullify rights normally considered in the state-law sphere. The definition and adjustment of property rights and the protection of health and welfare are matters primarily of state law. Thus, state courts may entertain wrongful death actions against airlines (*Porter v. Southeastern Aviation Inc.* [7 Avi. 17,-187], 191 F. Supp. 42 [M. D. Tenn. 1961]). In *Huron Portland Cement Co. v. City of Detroit*, 362 U. S. 440 (1960), it was held that a city was not precluded from applying its antismoke ordinance to a ship whose boiler was built in compliance with federal safety requirements and had received federal approval after inspection. *Huron* indicates that the presence of a federal license is not, therefore, all-controlling in deciding the question of federal preemption.

Closely allied with the defense of federal preemption is the contention of defendant City that it cannot be held liable for damage to property owners from jet aircraft noise because it has no control over the airlines' choice of aircraft engines or the flight altitudes on the glide paths to and from the Airport. Although these are matters regulated by the Federal Aviation Administration, they offer no valid defense to the defendant City. The United States Supreme Court rejected such a defense in *Griggs v. Allegheny County* [7 Avi. 17,866]. 369 U. S. 84 (1962). There it was held that Allegheny County, which owned and operated the Greater Pittsburgh Airport, was bound under the Fourteenth Amendment to the United States Constitution to compensate a property owner who was damaged as a result of aircraft flights over his land. The fact that approach patterns were within the navigable

airspace declared by Congress did not preclude the holding that there had been a "taking" of private property by the governmental owner and operator of the airport. The reasoning of the Supreme Court was that the County exercised the sole discretion to place the airport in the specific location, and that had it not so located the airport, there would have been no federal licensing of airplanes or fixing of navigable airspace to and from the specific location. Thus, in the case at bench, the City of Los Angeles made the decision to locate the Los Angeles International Airport where it now stands, and, as a result of that decision, must compensate those who own property adjacent to and near the Airport and who can establish that they have been damaged as a result of noise from jet aircraft.

[*Easement by prescription*]

One of the defenses asserted by the defendant City is that the defendant has acquired an easement by prescription because aircraft has used the airspace above plaintiffs' properties for more than five years preceding the filing of the complaint, and that the use of this airspace has been open and notorious and adverse to any interests claimed or asserted by plaintiffs. There is a serious question of whether it is legally possible for an operator and owner of an airport to obtain an easement by prescription with respect to aircraft flights over an owner's land. It is generally held that an easement in the air may not be obtained by prescription. See *Hinman v. Pacific Air Transport* [1 Avi. 640], 84 F. 2d 755 (9 Cir. 1936). However, defendant City offered no evidence to support this defense, and the matter requires no further consideration.

[*Statute of limitations*]

Another defense urged by defendant City is that plaintiffs are barred from relief by virtue of the statute of limitations provisions found in sections 312, 318, 319 and 338 of the Code of Civil Procedure. Asserted with this defense is the claim that plaintiffs are barred from relief by failing to file a claim with the City within one year after the accrual of a cause of action as required by Government Code section 911.2, formerly section 644. The evidence establishes that some of the plaintiffs filed claims with the defendant City on January 2, 1964, and the remainder on February 7, 1964. Obviously, if plaintiffs' cause of action arose more than one year prior to the above dates, the claims were not filed within the one-year period following the accrual of the cause of action. If the claims statute is applicable to a cause of action in inverse condemnation, and plaintiffs have not complied with the statute, plaintiffs have failed to prove a cause of action, and the statute of limitations provisions of the Code of Civil Procedure need not be considered. On the other hand, if the plaintiffs filed claims with defendant City within the prescribed one-year period, plaintiffs' complaint was filed within the requisite period following the denial of the claims so as to render inoperative any of the statute of limitations sections of the Code of Civil Procedure.

No authority has been cited by plaintiffs to justify a position that the one-year claims statute is inapplicable to a cause of action for inverse condemnation against a governmental entity. It appears to be an accepted rule of law that plaintiffs must file a claim for damages in inverse condemnation with the government agency under Government Code section 911.2 as a condition precedent to filing a lawsuit. See *Peacock v.*

County of Sacramento [10 Avi. 18,385], 271 A. C. A. 987, 993 fn. 5 (1969). Plaintiffs in this action assert that their cause of action for damages from jet aircraft noise arose in the year 1963, and that their claims filed in January and February of 1964, respectively, were thus filed in time. The defendant, while offering evidence tending to show that plaintiffs suffered no damage at all from jet aircraft noise, also offered evidence seeking to establish that any cause of action for damages from jet aircraft noise arose prior to the year 1963, with the consequent result that plaintiffs did not file their claims within the required one-year period. Although plaintiffs sought to prove that the year 1963 was the accrual date of their cause of action, no particular time in 1963 was sought to be established as the accrual date for the cause of action.

The question of when does a cause of action arise for damages to real property due to aircraft noise is a difficult and troublesome one and not easy of solution. However, this Court is satisfied that the evidence in this case establishes that plaintiffs' cause of action against the defendant City for damages to their properties from jet aircraft noise accrued in the month of May 1963. It follows that the claims filed by plaintiffs on January 2, 1964 and February 7, 1964, respectively, were filed within one year from the accrual of the cause of action. We now turn to a consideration of the evidence and authorities which support this conclusion. It cannot be contended with any degree of logic that when the first jet aircraft flew from the Los Angeles International Airport in 1959 a cause of action arose at that time. It is true that the evidence before this Court demonstrates that the same type of jet aircraft engine, regardless of the number of flights

and regardless when tested, makes the same broad-band noise in the sound spectrum and will produce the same numerical rating in terms of frequency in cycles per second and intensity decibels. However, the annoying, irritating and offensive factors involved in jet engine noise, insofar as interference with residential living is concerned, come into significant play because of the multiplication of the number of flights and the hours during the day or night when such flights take place. The number and timing of flights, as has been indicated before, become important because of the increased chances and opportunities for interference with normal communication and sleep, together with the ear's simple dislike of the type of noise generated by jet engines.

The increase in the number of jet landings and take-offs at the Los Angeles International Airport has been a gradual development from year to year since 1959. With this gradual process taking place, the issue to be decided is, at what precise month and year did the jet noise become so offensive and annoying that it substantially diminished the market value of plaintiffs' properties so as to create a cause of action for damages in inverse condemnation? It is without dispute and a matter of common knowledge that persons living near major airports have disliked the sounds emanating from the whining and screaming jets almost from the moment of their introduction. The evidence in the case at bench is to the effect that beginning with the year 1959 persons living within NEF Area "C" began to complain to Los Angeles city officials and other government officials about the noise from jet aircraft. The evidence also proves that in 1959 citizens adjacent to the Airport formed a Citizens Health and Welfare Council for the purpose of determining whether or not

some group action was available because of the jet aircraft noise condition. Individual plaintiffs attended meetings of this property owners' group from time to time, and individual plaintiffs joined the organization at various times. There is indication that prior to 1963 some of the plaintiffs may have believed that their properties were being reduced in market value by jet aircraft noise. Also, the Citizens Health and Welfare Council employed, prior to 1963, the attorneys who represent the plaintiffs in this case.

As the residents of the areas adjacent to the Airport made complaints to various government officials regarding the airport noise situation, they were advised that steps to reduce the jet noise were being taken by groups such as the Los Angeles Airport Commission and the Sound Abatement Coordinating Committee, and that progress was being made in the direction of aircraft noise reduction and abatement. However, the combination of these matters and events does not establish that a cause of action for damages resulting from jet aircraft noise arose while these matters and events were taking place. A cause of action for damages to real property resulting from jet aircraft noise does not arise from a landowner's belief that his property has been damaged by such noise. During the time of the formulation of this opinion of damage by various plaintiffs, Los Angeles city officials and other government officials were indicating that steps were being taken to alleviate and abate the problem of jet aircraft noise.

[*Stabilization theory*]

One accepted and tenable view is that a cause of action for inverse condemnation arises at such time as the particular damage factor involved becomes stabi-

lized. Applying this principle to jet aircraft noise as the damage factor, the inverse condemnation cause of action arises at such time when it can be said with some assurance that the annoyance factor of jet noise has become stabilized and has reached the point of causing the market value of the landowner's real property to be substantially reduced. This requires a factual determination. A landowner's personal opinion about whether and when his property became reduced in market value is of little assistance to the trier of fact unless the particular landowner is an appraiser, real estate broker or otherwise possesses expertise in the field of market-value determination.

Prior to the time when this stabilization of jet aircraft noise and its substantial effect upon the market value of real property have been reached, there is annoyance and irritation from jet aircraft noise and, at some point, a beginning effect upon the market value of real property, but this is non-compensable damage at this fluid state of events. How many flights per year, month or day must exist before the noncompensable annoyance and damage ripens into a cause of action? In *Jensen v. United States* [8 Avi. 17,127], 305 F. 2d 444 (Ct. Cl. 1962), the court espouses the view that the determination of when the point in time beyond noncompensable annoyance and damage is reached depends on making a judgment evaluating a variety of factors. The factors to be considered include "the frequency and level of flights; the type of planes; the accompanying effects, such as noise from falling ob-

jects; the use of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life. . . ." (*Jensen v. United States, supra,* at p. 447.) In evaluating such factors, it is obvious that sound judgment and discretion must be exercised in order not to overstress some of these factors and neglect others. Some factors may be more critical than others under the circumstances involved.

That California has adopted this stabilization theory for determining when a cause of action arises for inverse condemnation is evidenced by the case of *Pierpont Inn, Inc., v. State of California,* 70 A. C. 293 (1969). In *Pierpont Inn,* a cause of action for inverse condemnation resulted from the construction and operation of a freeway. At the time construction of the freeway began and at the time the landowner filed his claim with the state and commenced the action, section 644 of the Government Code required that a claim be presented to the State Board of Control "within two years after the claim first arose or accrued." The state contended that this statutory period began to run at the start of construction. The court, however, sustained the ruling of the trial court that the cause of action for inverse condemnation begins only when the situation is stabilized, and here the completion and operation of the freeway constituted the stabilization time, not the commencement of the work. Hence, the claims were filed within the appropriate time limit. In reaching this conclusion, the California Supreme Court

recognized that "There is a paucity of authority dealing with the problem of determining the exact date upon which a claim or cause of action for inverse condemnation arises. Prior to the age of the freeway, most inadvertent or intentional trespasses by authorities with the power to condemn were of such a nature that there was only a relatively brief interval of time between the first invasion upon the land and the completion of the project itself. Such authority as does exist, however, supports the holding of the trial court herein." (*Pierpont Inn, Inc., supra,* at p. 298.) *Aaron v. United States* [8 Avi. 17,421], 311 F. 2d 798 (Ct. Cl. 1963), also involved the problem of determining at what point in time land owners were affected by the noise from flights over their lands from an airport to such an extent as to create a cause of action for inverse condemnation. In that case, the trial judge fixed August 1953 as the beginning period for the cause of action and the statute of limitations to start running.

[*Jet aircraft noise*]

It is conceded that since the introduction of jet aircraft there has been a gradual increase in the number of jet aircraft takeoffs and landings at the Los Angeles International Airport. The number of jet aircraft landings, exclusive of propeller jets which are not true jet aircraft, for the years 1960 through 1965 are as follows:

Year	*Number*
1960	20,171
1961	33,932
1962	47,215
1963	59,776
1964	69,503
1965	86,855

By mathematical computation, the above yearly numbers produce an average of daily landings for the same years as follows:

Year	*Daily Landings*
1960	55
1961	93
1962	129
1963	164
1964	191
1965	238

The number of jet aircraft flights per day, month and year is obviously an important factor to be considered in determining when the noise situation stabilized to create a cause of action for inverse, condemnation. A factor of even greater significance, however, is the difference in the character of the noise created by the pure turbojet engine and that created by the turbofan jet engine. The turbojet engine was introduced first. It has already been indicated that the jet aircraft engine produces a broad-band noise spectrum dominated, however, by high frequency sound components. This description has reference to the turbojet engine, which also may be referred to as the pure jet engine. The turbofan jet engine was introduced after the use of the turbojet engine. The turbofan jet engine constituted a significant improvement in thrust in relation to fuel consumption. The turbofan jet engine is generally considered a more efficient engine than the turbojet engine.

Unfortunately, however, the turbofan jet engine was not an improvement insofar as noise considerations are concerned. The turbofan jet engine produces essentially the same range of frequency components of sound as that produced by the pure or turbojet engine. The noise

characteristics, however, of the two engines are startingly different. The turbofan engine introduced a noise characteristic which may be described as a monstrous siren effect and also a whining sound. Another pertinent description is to say that the turbofan engine introduced a propeller effect into the pure turbojet engine. Although the sound frequency range of the two engines is substantially the same, the active band levels in decibels are vastly different. The noise from the turbofan engine is much greater in intensity or magnitude. The common expression would be that there is a loudness feature of the turbofan engine over the turbojet engine by quite a large amount. Since there is a higher intensity or magnitude of sound from the high frequency components of the turbofan jet engine, the conclusion follows that the turbofan jet engine produces a much greater annoying, irritating and offensive effect than the pure or turbojet engine produces.

Studies of the two types of engines made with aircraft at an altitude of 300 feet during landing operations established that at that altitude the Effective Perceived Noise Level rating in decibels of the four-engine turbofan jet aircraft was 117.5, while the four-engine turbojet aircraft was rated at 112. Thus, the noise magnitude of the turbofan jet aircraft was 5.5 decibels higher than that of the turbojet or pure jet aircraft. This 5.5 decibel difference in the Effective Perceived Noise Level rating is highly significant in the effect of aircraft noise upon the human reaction to sound. It has previously been pointed out that an increase of 10 decibels in noise level is considered as a doubling of the annoying and irritating effect of noise. In view of this relationship, an increase of 5.5 decibels in the noise level caused by the use of the turbofan jet engine means

that the turbofan jet noise constitutes a 55 percent increase in annoyance and offensiveness to residents affected over that produced by the turbojet aircraft. This means also that the screaming and whining sounds produced by turbofan jet aircraft have caused a 55 percent increase in interference with speech communication, telephone communication and radio and television reception.

Plaintiffs introduced evidence of a comparison of jet aircraft landings per day at the Los Angeles International Airport for the months of May and October of 1962 and for the months of May and October of 1963, with particular reference to the percentage of fan jet aircraft to the total number of jet aircraft. This study revealed that in the month of May 1962 there were 121 daily jet landings, of which 34 were fan jet aircraft, which constituted 28 percent of the daily jet landings for that month. In October 1962, the daily landings of all jet aircraft were 133 in number, of which 53 were fan jet aircraft, constituting 40 percent of the total jet aircraft landings. In the month of May 1963, the number of landings per day of all jet aircraft was 148, of which 78 were fan jet aircraft, constituting 53 percent of the total jet aircraft daily landings. In the month of October 1963, the total number of daily jet aircraft landings was 156, of which 84 were fan jet aircraft, constituting 54 percent of the total daily jet aircraft landings. This study indicates a substantial increase in the annoyance and offensive features of jet aircraft in 1963 over 1962. The daily landings of jet aircraft increased from 121 in May of 1962 to 148 in May of 1963. In the same yearly period, the number of fan jet aircraft increased from 34 to 78, which is more than a doubling of the number of daily fan jet aircraft land-

ings. The percentage of fan jet aircraft out of the total of all jet aircraft increased from 28 percent to 53 percent during this same one-year period. The total increase in all jet aircraft landings in May of 1963 as compared to May of 1962 means there was a corresponding increase in the number of occurrences of irritating jet noise resulting solely from the increase in the number of aircraft flights. However, the more than doubling of the number of fan jets operating in May of 1963 over the number operating in May of 1962 introduced not only the greater frequency of annoying and irritating noise but also a greater annoyance effect because of the increase in the magnitude of the noise resulting from the greater use of fan jet engines in jet aircraft. Because of the two factors of an increase in the number of flights of all jet aircraft and an increase in the noise magnitude or intensity from the larger number of fan jet aircraft being used, the conclusion follows that from the standpoint of human body reaction, the annoyance effect from jet aircraft in 1963 was approximately three times greater than it was in 1962.

It appears that the month of May 1963 is the most important consideration in comparing the year 1963 with the year 1962 with respect to jet aircraft noise effects. From May 1963 to October 1963 the change in the number of daily fan jet aircraft being used was slight, and the percentage of fan jet aircraft to total jet aircraft changed only slightly. During this five-month period, the total number of daily fan jet flights changed from 78 to 84, while the percentage of fan jet aircraft to total jet aircraft changed only from 53 percent to 54 percent. It thus appears that as of May 1963, primarily because of the increase in the use of fan jet aircraft, the annoyance and offensive features of jet aircraft be-

came stabilized. Testimony of the real estate appraisers for plaintiffs was to the effect that market prices of real property within NEF Area "C" showed a noticeable drop in 1963 compared to market prices in 1962. A finding is thus made by this Court that noise from jet aircraft, as it interfered with residential living and substantially affected the market value of real property in the area described as NEF Area "C," became stabilized in the month of May 1963. This is the date which this Court finds to be the time of accrual of plaintiffs' cause of action for damages for inverse condemnation. The claims of the plaintiffs filed with the defendant City in January and February of 1964 were filed, therefore, within the time required by law. It follows that the plaintiffs' cause of action is not barred by any statute of limitations provisions of the Code of Civil Procedure relied upon by defendant City.

[*Public convenience*]

Another defense urged by defendant City is that public convenience and necessity for more than five years preceding the filing of the complaint required, and still requires, the use of the airspace over and adjacent to the properties of plaintiffs for public aviation purposes. We all recognize that jet aircraft is a modern necessity and convenience for public travel. Some inconvenience, discomfort and annoyance from the noise of such aircraft must be borne and tolerated by citizens as a part of urban living. There is a limit, however, to the annoyance and damage from aircraft noise which residents must tolerate and bear without compensation. This limit is reached as to those property owners located in the vicinity of the flight paths of the landing and takeoff aircraft who suffer from jet aircraft noise out of proportion to other residents of the community

who are inconvenienced and annoyed by jet aircraft noise. Public convenience and necessity cannot be permitted to justify the damaging, without compensation, of the property of persons living in close proximity to the landing and takeoff aircraft patterns. However, because of the great public convenience and necessity for jet aircraft and air travel, the public in general who benefit from the existence of jet aircraft and air travel must pay for this convenience and necessity through the compensation allowed to the few who are damaged by virtue of the chance selection of their place of abode.

[*Diminution of market value*]

We now come to the question of whether there has been proof of substantial diminution in the market value of the various parcels of property involved in this case. We have the testimony of two real estate appraisers for the plaintiffs. The approach of the appraisers for the plaintiffs was to select comparable areas not affected by jet aircraft noise, consider sales of comparable property in the unaffected areas, and then determine a fair market value of plaintffs' parcels as of the year 1963, assuming that such parcels were not affected by aircraft noise. Then the appraisers considered 1962 and 1963 sales of comparable properties located within the area designated NEF Area "C" and reached an opinion of the fair market value of plaintiffs' parcels in the year 1963 as affected by jet aircraft noise. Using this difference in the fair market value of the plaintiffs' parcels of property as if they were not affected by the jet aircraft noise and the fair market value as affected by the jet aircraft noise, an opinion was reached as to the damage in terms of the dollar amount of the diminution in market value. On the

other hand, the defendant City offered evidence to establish that there had been no diminution in market value of the plaintiffs' properties because of noise from jet aircraft.

The approach and opinions of plaintiffs' appraisers leave much to be desired. Thus, in seeking and using comparable properties in areas not affected by jet aircraft noise, no consideration was given to the fact that plaintiff owners originally purchased their properties in the areas adjacent to the Airport and in the vicinity of the flight paths of propeller-driven aircraft. Such a location made these homes less desirable than residences located on quiet streets unaffected by noise from freeways, busy streets or commercial development, which were used as unaffected comparable areas. For most of the parcels of property appraised, plaintiffs' appraisers reached opinions of a range of market values, both as unaffected by jet noise and as affected, rather than a single value. As an illustration, an opinion was stated that a particular parcel had an affected market value from $22,000 to $24,000 and an unaffected market value of $25,000 to $27,000. Then a single damage figure was given, such as $2,000. The testimony indicated that the range of market values developed because one appraiser's opinion was the lower figure in the range, and the other appraiser's opinion was the higher figure. The appraisers were unable to testify as to which appraiser used the lower figure and which the higher figure. The testimony was that they appraised all of the properties as a team, but at the time of trial, they had no memoranda or recollection of the separate opinions as to market value of each appraiser. The dollar amount agreed upon as the amount of damages for each parcel appraised appeared to be

a compromise reached by the two appraisers, in many instances, as the dollar amount of damages did not coincide with a figure reached by simply subtracting the market values as affected from the market values as unaffected.

The combined approach and compromise of the two appraisers for plaintiffs placed the Court in a difficult position in evaluating the opinions of the two appraisers. It would seldom happen in a trial that the opinions of two appraisers would be given equal weight by the trier of fact. Had each appraiser given his separate opinion of value, the plaintiffs' evidence of damages would have been more credible. In dealing with the appraisal of apartment houses and rental units as contrasted with single-family homes, plaintiffs' appraisers at no time used the two methods of a reproduction cost approach or the capitalization of income approach, even though in many instances it was conceded that sales of comparable properties were not readily available. Also, in the appraisal of some rental units, plaintiffs' appraisers applied a gross multiplier method for the purpose of aiding them in the formulation of their opinions of value. It is true that this method does have some usefulness in the market place, but it is subject to the criticism that it is too rough a measure to be given much weight in arriving at market value opinions. Also, in appraising some multiple units, plaintiffs' appraisers used a price per unit approach by computing the sales price per unit on sales of multiple units which were not really comparable to the apartment buildings being appraised. Opinions predicated on this approach are not entitled to a great deal of weight, since a per-unit sales price approach fails to adequately take into account varying factors, such as differences in sizes of

units, in room size and arrangement and in the number of bedrooms per unit.

The approach of defendant City in presenting evidence tending to show that plaintiffs' properties were not reduced in market value by jet aircraft noise was entirely different from the approach of plaintiffs. An appraiser for defendant City testified and expressed an opinion that the residential properties in NEF Area "C" did not decrease in market value at all in 1963, and hence were not damaged by the noise from jet aircraft. The reasons given in support of this opinion were manifold. The City's appraiser made no appraisal of separate parcels of property. However, he studied that portion of NEF Area "C" east of the Airport, particularly with respect to factors of new construction of residential properties, loans made by lending institutions, whether rental units appeared to be fully occupied and whether the residential properties appeared to be well kept to indicate a pride of ownership and a healthy economic condition. All of these factors were considered for the years 1963 to 1968. For the years indicated, his testimony was that permits for new construction amounted to $8,957,956. These permits included 868 residential units, of which there were 45 apartment houses, 63 duplexes, 67 single-family residences and 32 swimming pools. Loans were granted by lending institutions in substantial amounts on the various types of residential properties, from single-family to large apartment houses and for the construction of new swimming pools. The opinion of the City's appraiser was that all of these factors indicated that in the period 1963 through 1968 there was a healthy condition with respect to residential property in NEF Area "C," and that there was confidence in the real

estate market on the part of persons owning residential property in this area. There was evidence tending to show that there were few "For Sale" or "For Rent" signs in this area, and no indication of any abnormal vacancy factor in rental units. The evidence disclosed that many parcels in NEF Area "C" sold on the open market fairly soon after they were listed for sale with real estate brokers, a further indication of an active real estate market. There can be no dispute that NEF Area "C" has continued to be fully utilized for residential purposes in spite of the noise from jet aircraft.

[*Price-trend studies*]

The opinion of the City's appraiser that property parcels involved in this case suffered no market damage at all from jet aircraft noise is based in part on the results of price-trend studies of sales and resales of parcels in selected portions of NEF Area "C" east of the Airport and sale and resale price-trend studies of parcels in comparable areas outside of NEF Area "C." Four selected portions of NEF Area "C" east of the Airport were considered. The most distant portion from the Airport is a section immediately west of Western Avenue. A second portion is located between Crenshaw Boulevard on the west and Van Ness Avenue on the east. A third portion studied is located west of Crenshaw Boulevard, with Doty Avenue being the westerly line and Yukon Avenue the easterly line. The portion closest to the Airport is located between Inglewood Avenue on the west and Mansel Avenue on the east. The three test areas outside of NEF Area "C" used by the appraiser include two areas south of NEF Area "C" and one area north of NEF Area "C". One of the southerly areas is in Inglewood south of 115th Street, between Crenshaw Boulevard on the west and Western

Avenue on the east. A second test area is Hawthorne south of El Segundo Boulevard, between Prairie Avenue on the west and Yukon Avenue on the east. The northerly test area may be described as the Overhill area, which is north of Slauson Avenue and immediately east of La Brea Avenue. The sales price-trend studies did not consider these sections separately. The three test areas were considered together, and the four portions of NEF Area "C" east of the Airport were considered together. The period covered by these sales price-trend studies was from 1955 to the first few months of 1969. The method used was to consider purchases or sales and resales of the same parcels of property during the period covered. The difference between the purchase price and resale price was taken, whether that constituted an increase or decrease in sales price. This difference was converted into a gross percentage increase or decrease over the original purchase price. The number of years elapsing between the date of purchase and the date of resale was divided into the total percentage increase or decrease to obtain an average yearly price increase or decrease. For example, if a home had been purchased in 1960 for $25,000 and resold in 1964 for $30,000, the $5,000 difference constituted a 20 percent increase in sales price over the original purchase price. The four-year period between the purchase date and resale date divided into 20 percent gives a five percent average annual increase in sales price. There were 341 sales sets considered in the selected portions of NEF Area "C" east of the Airport, which also included 179 sales sets of parcels of property involved in this case. The test areas contained 402 sales sets.

The appraiser for the defendant City expressed an opinion that the sales price-trend studies indicated the same upward trend in sales prices for residential properties located in the portions of NEF Area "C" studied as was shown for residential properties in the test areas. The appraiser for the City testified that mathematically the sales price-trend studies indicated that in the portions of the NEF Area "C" east of the Airport there was an average annual increase in sales prices of 4.57 percent for the period 1955 to 1969, and that in the test areas used for comparison with NEF Area "C" east of the Airport, the average annual increase in sales prices amounted to 4.96 percent for the same period of years.

The same kind of sales price-trend study was made by the City's appraiser for a portion of NEF Area "C" west of the Airport and covered, generally the beach community known as Playa del Rey. The portion of Playa del Rey considered as a part of NEF Area "C" for this sales price-trend study is from Killgore Street on the south to Sterry Street on the north. The test areas used to compare with the subject area of Playa del Rey included a portion of Playa del Rey north of Sterry Street and a portion of Pacific Palisades called the Castellamare area. This comparative sales price-trend study indicated an average annual sales price increase in the subject area of Playa del Rey of 5.89 percent. There was an average annual increase in sales prices for the test areas compared with the Playa del Rey area of 5.68 percent.

[*Comparability of areas*]

Among the factors to be considered in evaluating the merit and worth of an appraiser's opinion of market value is the degree of comparability of the areas and

sales selected for comparison with the property being appraised. So, also, the value, validity and worth of conclusions to the drawn from comparative sales price-trend studies depend, in part, upon how truly comparable are the areas selected for the control or test areas. As a part of the two days spent by this Court in viewing the areas involved in this litigation, the Court viewed the various test areas used by the appraiser for the City and portions of areas used by the appraisers for the plaintiffs to obtain their comparable sales. The Court found little comparability between the Castellamare area of Pacific Palisades and the subject Playa del Rey area located in the westerly portion of NEF Area "C". The subject Playa del Rey area appeared to the Court to be a much more desirable residential area than the Castellamare area, considering such factors as the ocean view, the size of the lots and the land topography.

In testifying regarding his visits through NEF Area "C" east of the Airport, the appraiser for the City said that he did not notice and was not particularly aware of the planes or of noise from them as they proceeded toward the Airport for landing. He testified that at no time did he have to stop talking because of any jet aircraft noise. This testimony is incredible. It is inconceivable to the Court, in view of what the Court saw and heard relative to the flow of jet aircraft over NEF Area "C" to make their landings. How any person with normal sight and hearing could be in the area for any period of time and not be acutely aware of the flow of jet aircraft traffic and the screaming noise coming therefrom, is beyond comprehension.

[*Price increase*]

In interrogatories submitted to plaintiffs by defendant and in answers to such interrogatories, information was given as to the date of purchase and the purchase price of the parcel involved, together with the sales date and sales price if the particular plaintiff had sold his parcel of property either before or subsequent to the commencement of the lawsuit. This information was given to the appraiser for the City, who testified that an analysis of this information indicated that there was a 4.01 percent average annual price increase of the plaintiffs' properties based on this submitted information. The appraiser for the City further testified that the sales price-trend studies would not indicate that any particular parcel of property had a market value as of any particular date; that the average annual price increase would not indicate any actual market price increase for any particular year, and that no inference could be drawn of whether there was a particular market price decrease or increase in any particular year involved in the period studied, which included the years 1962 and 1963. The appraiser for the City made clear that the average annual percentage price increase shown in the sales price-trend studies would not lead to a conclusion that this percentage represented an actual percentage increase in the market value of property between the years 1962 and 1963.

Comparing the average yearly price increase of 4.57 percent for residential property located in the portions of NEF Area "C" east of the Airport with the average yearly price increase of 4.96 percent for the residential property located in the selected comparable control areas, the average yearly price increase for the portions of NEF Area "C" studied was 0.39 percent less

than the average yearly price increase for the test areas. The period studied was from 1955 to the first few months of 1969. This constitutes a total period of fourteen years and a few months. If we consider the fourteen-year period as a whole and the average yearly difference in sales price increase of 0.39 percent between the subject area and the test areas, we find that the gross or total sales price increase in the subject NEF Area "C" east of the Airport was approximately 5.50 percent less than the gross sales price increase for the test areas. In view of the fact that the average annual percentage increase does not indicate the actual status of the real estate market in any particular year, the percentage increase for the entire fourteen-year period considered becomes significant. It might well be that the approximate 5.50 percentage difference in the sales price increase between the subject area and the test areas reflects this kind of percentage decline in real estate market prices in one particular year in the subject area. The fact that for the entire period studied there is this type of percentage difference lends support to the contention of plaintiffs that there was a substantial decrease in the market value of residential properties located in NEF Area "C" in the year 1963.

The contention of plaintiffs with respect to a diminution in the market value of residential property within NEF Area "C" resulting from jet aircraft noise is likewise bolstered by the conclusions of the City's appraiser regarding the sales and resales of plaintiffs' parcels gathered from the interrogatories and answers thereto. The average annual sales price increase of 4.01 percent is considerably less than the average annual sales price increase of 4.96 percent obtained from the study of the test areas used by the appraiser. The

average annual sales price increase of 5.89 percent found in the Playa del Rey portions of NEF Area "C" is higher than the average annual sales price increase of 5.68 percent found in the test areas used for comparison. In view of the Court's finding that the test areas used for comparative purposes with the Playa del Rey portions of NEF Area "C" exhibited considerable differences, a comparison of the two average annual percentage sales price increases is not particularly helpful. This comparison, therefore, does not demonstrate or lead to the conclusion that the properties in the Playa del Rey portion of NEF Area "C" were not adversely affected in market value by the noise from jet aircraft taking off from the Airport.

Comparing the average annual sales price increase of 5.89 percent in the Playa del Rey portion of NEF Area "C" with the average annual sales price increase of 4.57 percent in the portion of NEF Area "C" east of the Airport tends to indicate that the Playa del Rey community has had a much better real estate market condition than the communities east of the Airport. But this does not lead to a conclusion that noise from jet aircraft landings has a greater impact upon the real estate market than noise from jet aircraft takeoffs. The testimony of the experts on sound and noise indicates that there is very little difference between the Effective Perceived Noise Level rating of jet aircraft on takeoffs as contrasted with landings. Although the evidence convinces the Court that some residential property in the Playa del Rey portion of NEF Area "C" was adversely affected in market value by noise from jet aircraft in 1963, the evidence likewise establishes that the Playa del Rey community was not as seriously

affected in market value depreciation as those areas located east of the Airport.

Another factor which concerned the Court in evaluating the appraisers' opinions in this case was the use of 1962 sales of comparable property within the subject area involved. The appraisers for the plaintiffs used 1962 sales along with 1963 sales of properties in NEF Area "C" to support their opinion of market value diminution in 1963 as a result of jet aircraft noise. They explained their use of 1962 sales by stating they considered such sales prices as indicating only a slight effect of jet noise upon market values as compared to 1963 comparable sales indicating a major effect of jet aircraft noise upon market values, and that this difference was duly considered in aiding them to arrive at their opinions of the market values of the plaintiffs' properties being appraised as of 1963. No indication was ever given of how much in terms of dollars or percentages, the 1962 comparable sales prices represented in depreciated market value from jet aircraft noise.

[*Comparison of sale prices*]

Since the time of the substantial effect upon market value from jet aircraft noise occurred in 1963, it would appear that a helpful method of determining the effect of jet aircraft noise upon market value in 1963 would have been to consider sales prices of property within NEF Area "C" which took place in 1961 and 1962 and compared those sales prices with sales prices of comparable property for the years 1963 and 1964. Such a comparison of sales prices should produce some reflection of the effect of jet aircraft noise upon the market value of properties located within the affected area. However, no effort was made by either the ap-

praisers for the plaintiffs or the appraiser for the defendant City to use this approach of comparing sales prices within the affected area before the advent of jet aircraft noise with the sales prices of comparable property taking place after the advent of jet aircraft noise. One objection to this approach would be that there might be an absence of a sufficient number of sales of comparable properties to make such a comparison meaningful. But there was no testimony to indicate that there was any lack of comparable sales before 1963 to preclude using this approach to help support the opinion that market values were substantially affected by jet noise in 1963 or to support the opinion that there was no substantial effect upon market values in 1963 from jet aircraft noise.

The parties stipulated that one of the north runways of the Airport, designated 24L, was used sporadically from 1960 to 1967, and that not until 1968 did this specific runway go into regular use by jet aircraft. The parties also stipulated that the second north runway, the most northerly one, designated 24R, is not yet fully constructed and hence has never been in use. In view of this stipulation, it is apparent that property in the Playa del Rey community was not affected in 1963 by any jet aircraft takeoffs from the north runways of the Airport. Property located in the northerly section of NEF Area "C" in Playa del Rey are much closer to the north runways than they are to the south runways. These are factors which must be taken into account in determining whether these residential properties in Playa del Rey suffered any market value diminution in 1963. The evidence convinces the Court that these northerly located Playa del Rey parcels of property were not substantially adversely affected in 1963 by

any jet aircraft noise. These are the parcels of property in Playa del Rey situated north of Century Boulevard. These parcels are too distant from the south runways to be materially affected by noise from jet aircraft taking off from these runways. We are not concerned in this case with the effects of noise from jet aircraft taking off from the north runway, 24L, beginning regularly in 1968.

Only a few of the approximately one thousand five hundred plaintiffs have testified in this case. Some of the plaintiffs who testified live in the Playa del Rey area and others live in the portion of NEF Area "C" that is east of the Airport. On the whole, their testimony related the annoyance features of jet aircraft noise upon normal communication in the home, upon enjoyment of radio and television programs, upon telephone communication and the effects of smoke, soot and debris left in the wake of jet aircraft. This evidence by the plaintiffs who testified was substantiated by the two appraisers for plaintiffs who testified to seeing and hearing the jet aircraft at each parcel of property they appraised.

Although the Court finds that most of the properties involved in this lawsuit and located in both the easterly and westerly portions of NEF Area "C" have suffered substantial damage by reason of jet aircraft noise culminating and stabilized in 1963, with respect to a number of the parcels of properties involved in this lawsuit, the plaintiffs have simply failed to establish that they have been substantially damaged by jet aircraft noise. Consequently, as to these properties, no recovery will be permitted.

[*Flight easement*]

It is the position of the defendant City that an award of compensation should carry with it the grant of an easement to the defendant City for jet aircraft flights as flyovers or flybys with respect to the particular parcel of real property. This result is dictated by the legislative recognition of such an easement found in section 1239.3 of the Code of Civil Procedure.

The question is raised, however, of whether such a flight easement in airspace is permanent so far as the damage to the property so affected is concerned. If the City is granted an easement as a result of compensation awarded to property owners, is there any recourse if the number of jet flights are increased or the character of the jet engines is changed so that the Effective Perceived Noise Level is increased, resulting in a further reduction in the market value of property over and above that found to exist by virtue of the judgment? The general law of easements would seem to have application in this situation. So long as the burden of the easement upon the property owner is not increased, there would be no basis for additional relief. However, if the property owner is able to establish that subsequent increases in the number of jet flights using the airspace or the character of the noise has changed so that there is a substantial increase in the effective Perceived Noise Level, with a resulting further diminution in the market value of the affected property, the property owner should be entitled to recover the additional damage in such a case. The burden of proof would be upon the property owner to establish that there has been such an increase in the number of flights or a change in the character of the noise from factors in addition to, or separate from, the number of flights

to justify a cause of action for additional damage. In this case, the award of compensation and the corresponding easement are determined for conditions existing in the year 1963.

[*Award of compensation*]

Listed below in Schedule A [not reproduced] are the parcels of real property which the Court finds to have been substantially damaged in terms of market value depreciation by noise from jet aircraft, and the amount of damage which the Court finds each parcel listed to have suffered as of May 1963. The parcels are listed in accordance with the designation given by the appraisers who testified for plaintiffs. The type of property is indicated by appropriate abbreviations. A single-family home is indicated by the abbreviation "S/F," and multiple-family property is identified by the number of units involved, such as a four-family property being identified with the abbreviation "4/U."

SCHEDULE A

[Not reproduced]

[*Compensation denied*]

Set forth in Schedule B [Not reproduced] below is a list of parcels of real property with respect to which the Court finds the evidence to be insufficient to establish any market value loss or depreciation in 1963 as a result of noise from jet aircraft. Some of these parcels are located in NEF Area "C," while others are located in NEF Area "B." The abbreviations used in Schedule B are the same as those used in Schedule A, *supra*. To the extent that a cause of action was alleged with respect to any parcel of real property not set forth in either Schedule A or Schedule B, judgment is to be rendered against any plaintiff alleging an inter-

est in such parcel, as no evidence was offered regarding damage to any parcels of property not set forth in either Schedule A or Schedule B.

SCHEDULE B

[Not reproduced]

[*Interlocutory judgment*]

The judgment to be rendered in this case will be an interlocutory judgment. Further proceedings must be conducted to determine which plaintiffs are entitled to a final judgment for damages with respect to the specific parcels of real property as set forth in Schedule A. The evidence disclosed that various plaintiffs sold their parcels of real property during the period from 1962 to the date of trial. It is alleged in the complaint that certain plaintiffs claim a right of action against defendant City of Los Angeles by virtue of being the owners in fee of their parcels of real property; that the rights of other plaintiffs exist by virtue of equitable ownership in their parcels of real property resulting from contracts of purchase, and that other plaintiffs claim a cause of action for damages by virtue of written assignments in their favor. The Court's determination herein that a particular parcel of real property has been damaged by noise from jet aircraft in a specified amount is not to be construed as a determination that any particular plaintiff is entitled to a final judgment in his favor. A particular plaintiff's right to receive the damage amount determined herein for a particular parcel of real property must be established in subsequent proceedings to be held in this case.

A judgment is to be prepared in accordance with the views expressed herein.

APPENDIX "D."

Federal Aviation Act of 1958.
49 U.S.C., 1301 et seq.
Provisions Involved:

[49 U.S. Code 1304]. "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

[49 U.S. Code 1348]. "(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest."

"(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects."

[49 U.S.C. 1431]. (a) For purposes of this section:

(1) The term "FAA" means Administrator of the Federal Aviation Administration.

(2) The term "EPA" means the Administrator of the Environmental Protection Agency.

(b)(1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 608(a) of this Act for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the considerations listed in subsection (d).

(c)(1) Not earlier than the date of submission of the report required by section 7(a) of the Noise Control Act of 1972, EPA shall submit to the FAA proposed regulations to provide such control and abate-

ment of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, which publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with the EPA, the FAA shall—

(A) in accordance with subsection (b), prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1)(A)(ii) or (1)(B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the

FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made. The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 102(2)(C), the report of the FAA indicated that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than

ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

(d) In prescribing and amending standards and regulations under this section, the FAA shall—

(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this Act and the Department of Transportation Act;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise

or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 609, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control or abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

APPENDIX "E."

Airport and Airway Development Act of 1970.
49 U.S. Code 1701 et seq.
Provisions Involved:

"The Congress hereby finds and declares—

"That the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation.

"That substantial expansion and improvement of the airport and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.

"That the annual obligational authority during the period July 1, 1970, through June 30, 1980, for the acquisition, establishment, and improvement of air navigational facilities under the Federal Aviation Act of 1958 (49 U.S.C. 1301 et seq.), should be no less than $250,000,000.

"That the obligational authority during the period July 1, 1970, through June 30, 1980, for airport assistance under this title should be $2,500,000,000."

APPENDIX "F."

Noise Control Act of 1972.
PL 92-574.
Provisions Involved:

"Sec. 611. (a) For purposes of this section:

"(1) The term 'FAA' means Administrator of the Federal Aviation Administration.

"(2) The term 'EPA' means the Administrator of the Environmental Protection Agency.

"(b) (1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this title. No exemption with respect to any standard or regulation under this section may be granted under any provision of this Act unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted."

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-672

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

IRVING D. AARON, *et al.*,
Respondents.

Supplement to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

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The Petitioner, City of Los Angeles, a municipal corporation, herein submits a supplement to its prayer that a Writ of Certiorari issue to review the opinion and judgment of the Court of Appeal, Second Appellate District, of the State of California, rendered in this proceeding on September 4, 1974.

The Petition of the City of Los Angeles in the case at bar was filed with your Honorable Court on November 29, 1974. On December 2, 1974, the Petitioner was informed, pursuant to a telephone communication from an Assistant Clerk of this Court, that the Court may construe the Petition as not being timely filed. This supplement is addressed to that apparent problem.

In submitting this supplement, the City of Los Angeles has become familiar with your Court's decisions as to when a judgment becomes final. *Department of Banking v. Pink* (1942) 317 U.S. 264; *Market Street Railroad Co. v. Railroad Commission of California* (1945) 324 U.S. 548, and *Scofield v. National Labor Relations Board* (1969) 394 U.S. 423.

The Petitioner acknowledges and appreciates that your Court must adopt certain guidelines for the orderly flow of cases which are submitted to the Court. In this regard, the Petitioner submits that its actions are within the spirit and intent of the Court's decisions as to when a judgment is final.

Petitioner urges this Honorable Court to consider the following circumstances in arriving at a decision as to the timeliness of the filing of the Petition herein:

1. The California Supreme Court, by postal card, denied a petition for hearing in the instant action on August 28, 1974. A copy of said postal card notification, for the convenience of the Court, appears at Appendix A to this supplement. The judgment of the California Court of Appeal, Second Appellate District, became final seven (7) days later on September 4, 1974. Since it is the Court of Appeal decision that is the subject of this petition, the ninety (90) day period was calculated from September 4, 1974.

2. If the ninety (90) day period within which to file the petition runs from August 28, 1974, the final date to file said petition was November 26, 1974. If the ninety (90) day period within which to file the petition runs from September 4, 1974, the final date to file said petition was December 3, 1974.

3. Opposing counsel were served by mail with the petition on November 26, 1974, which is within each of the ninety (90) day periods of calculation. A copy of the Proof of Service by Mail for the convenience of the Court appears at Appendix B to this supplement. The service took place seven (7) days prior to the expiration of the ninety (90) day period subsequent to September 4, 1974.

4. Instructions were given to BorAir Freight to file the petition on November 27, 1974, one (1) day beyond the ninety (90) day period from August 28, 1974 but six (6) days prior to the expiration of the ninety (90) day period from September 4, 1974. A copy of these instructions is contained within the files of this Court.

5. The Petition herein was filed at 9:30 a.m. on November 29, 1974, three (3) days beyond one period and four (4) days before the expiration of the other.

Accordingly, Petitioner urges your Honorable Court to consider the circumstances described herein which support the conclusion that the Petition for Certiorari was timely filed.

Respectfully submitted,

BURT PINES,
City Attorney,

MILTON N. SHERMAN,
Chief Assistant City Attorney,
Counsel for Petitioner.

APPENDIX "A."

Postal Card Notice Denial of Petition for Hearing by California Supreme Court.

Burt Pines, Esq.
City Attorney
#1 World Way
Los Angeles, CA 90009

Attn: John F. Haggerty
Deputy

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102
Aug. 28, 1974.

I have this day filed Order Hearing Denied.

In re: 2 Civ. *No.* 40999, Aaron et al. *vs.* City of Los Angeles.

Respectfully,

G. E. BISHEL
Clerk

APPENDIX "B."

Proof of Service by Mail on Opposing Counsel.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On November 26, 1974, I served the within Petition for Writ of Certiorari in re: "City of Los Angeles vs. Irving D. Aaron", in the Supreme Court of the United States, October Term 1974, No. ....; on the attorneys in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

JAMES E. SLOAN
2580 Honolulu Avenue
Montrose, Ca. 91020

LYLE C. ELLIS
15233 Ventura Blvd.
Sherman Oaks, Ca 91403

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on November 26, 1974, at Los Angeles, California.

/s/ Jean Drennen

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-672

CITY OF LOS ANGELES, a municipal corporation,
Petitioner,

vs.

IRVING D. AARON, *et al.*,
Respondents.

Respondents' Brief in Opposition to Petition for Writ of Certiorari.

For the reasons set forth herein, Respondents pray that the Writ of Certiorari sought by Petitioner not be issued and that the decision of the Court of Appeal (Second Appellate District) of the State of California remain undisturbed.

JURISDICTION.

A. The Petition Was Not Timely Made.

Petitioner erred when on page 2 of its Petition it stated that the decision of the Court of Appeal was entered on September 4, 1974. The Remittitur was issued on September 3, 1974, and possibly it was received by Petitioner on September 4, 1974.

The decision of the Court of Appeal (Second Appellate District) of the State of California was entered on July 3, 1974. (Appendix B, Petitioner's Petition, p. 2 of Appendices.)

The Supreme Court of the State of California denied a Petition for Hearing on August 28, 1974. (Petitioner's Petition, p. 1.)

No other hearings or motions have been either sought or made in any court other than Petitioner's Petition to this Court for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District.

The provisions of 28 USC 2101(c) pertinent to Respondents' contention read as follows:

> ". . . any writ of certiorari to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be applied for within 90 days after the entry of such judgment or decree . . ."

Respondents submit that since the Judgment Petitioner asks this Court to review is the Judgment of the California District Court of Appeal which was entered on July 3, 1974, under Rule 34(1) of this Honorable Court, the 90-day period of time referred to in 28 USC 2101(c) began to run on July 4, 1974 and expired on October 1, 1974. Petitioner filed the Petition herein with the Clerk of this Honorable Court on November 29, 1974.

Respondents concede that had the California Supreme Court granted Petitioner's Petition for a hearing, a new date for computing time would have come into being. Such, however, is not the case. Since the State Supreme Court denied the Petition to hear the matter, the final decision of the State Court to be reviewed by this Honorable Court is that of the Appellate Court of the State of California. That decision was entered on July 3, 1974.

In making their contentions Respondents are guided by the guidelines set forth by this Honorable Court in the case of *Market Street Ry. Co. v. Railroad Commissioner of California*, 324 U.S. 548, 65 S.Ct. 770, 89 L.Ed. 1171 where this Court stated:

> "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment . . . Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek a review begins to run. A timely petition for rehearing defers finality for our purposes until it is acted upon or until power to act upon it has expired. . . . If the rehearing is granted, the judgment is opened, and does not become final as a prerequisite to application for review by us until decision is rendered upon rehearing."

Even if for purposes of argument should Respondents concede that the Judgment sought to be reviewed was that of the California Supreme Court when it refused to review the California Appellate Court's decision, Petitioner's Petition still would be filed too late. The decision of the California Supreme Court was entered on August 28, 1974. The ninetieth day after August 28, 1974, is November 26, 1974, three days before the Petition to this Court was filed.[1]

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[1]Just prior to the completion of this brief, Respondents were served with a Supplement to Petition in which Petitioner sought to justify its late filing of the original Petition.

Paragraph 2 of said Supplement is in error respecting the date the Appellate Judgment Petitioner seeks to review became

(This footnote is continued on next page)

B. Petitioner Has Made No Showing That the Instant Case Comes Within the Purview of 28 USC 1257(3).

1. The Validity of a Treaty, United States Statute or State Statute Has Never, at Any Time, Been Drawn in Question.

The validity of a treaty or statute of the United States has never at any time been drawn in question.

Respondents brought this action for inverse condemnation under the provisions of Article I, Section 14 of the California Constitution which provides, *inter alia:*

> "Private property shall not be taken or damaged for public use without just compensation having first been made to or paid into court for the owner. . . ."

The Petitioner has never contended that the foregoing state constitutional provision is ". . . repugnant to the Constitution, treaties or laws of the United States . . ."

The only defendant in this lawsuit is the City of Los Angeles. It would thus appear that the only basis upon which the City could invoke this Court's jurisdiction, under 28 USC 1257(3), is its contention that

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final. Rule 24 of California Court Rules states, in part, ". . . A decision of a Court of Appeal becomes final as to that court 30 days after filing. . . ." Thus, even if this Honorable Court were to accept the California Rule as stated above as determinative of its own jurisdiction, the date of final decision would have been August 2, 1974, and the ninetieth day thereafter would have been October 31, 1974.

Contrary to Petitioner's contention on page 3 of Supplement to Petitioner's Petition, Respondents were not served prior to the expiration of the ninety-day period. Moreover, Respondents submit that, other than the necessity of service as required by Rule 33 of this Court, the date of service by mail is not material to the question of what the effective filing date might be. Pursuant to Rule 21(3) Respondents have been notified that the Petition was docketed in this Court on November 29, 1974.

merely because aircraft flowing through the lanes of interstate commerce land and take off from the airport it owns and operates, it is privileged or immune from complying with Article I, Section 14 of the California Constitution.

2. The Effect of Griggs v. Allegheny.

It is axiomatic that this Honorable Court can decline jurisdiction if the federal question the Petitioner seeks to raise has ceased to be substantial because it has already been settled by a previous decision of this Court.

Respondents submit that this Court had already decided the federal question which Petitioner sought to raise below in the case of *Griggs v. Allegheny County*, 369 U.S. 84.

3. The Only Question of Substance Before the Courts Below Was a Non-Federal Question.

In the case of *Honeyman v. Hanan*, 300 U.S. 14, 18 this Honorable Court stated:

> "Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented to the highest court of the State having jurisdiction *but that its decision of the federal question was necessary to the determination of the case.*" (Emphasis our own.)

Respondents submit that the State Court did not have to decide a federal question necessary to the determination of the case because:

1. The only relief sought by the Respondents was enforcement of their state constitutional right to

compensation when their property was taken or damaged by the City of Los Angeles for a public use.

2. No relief was sought or granted which would in any way impair the use of the air lanes by either the City of Los Angeles or the planes using them in landing or taking off or in any manner restrict flight to or from the Los Angeles International Airport.

The only question of substance before the state courts was whether or not the Petitioner did in law and fact damage or take Respondents' properties without the payment of just compensation in violation of the California Constitution. This is clearly a non-federal question.

The ruling of the California District Court of Appeal was as follows:

> ". . . we hold that the municipal operator of an airport is liable for taking or damaging of property when the owner of property in the vicinity of the airport can show a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the property, and the interference is sufficiently peculiar that the owner, if uncompensated, would pay more than his proper share to the public undertaking." (See Appendix B, Petitioner's Petition, p. 32 of Appendices.)

Even if for purposes of argument, Respondents were to concede that the record shows a federal question had been presented, Respondents submit that the rule of

Browne v. Union Pacific R.R. Co., 267 U.S. 255, as quoted below, is applicable:

> "It is well settled that where the Supreme Court of a State decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

ERROR IN PETITIONER'S DESCRIPTION OF QUESTIONS PRESENTED.

Petitioner predicates the questions it seeks to present to this Court on its statement that:

> "The judgment in the case at bar directs recovery against the City of Los Angeles in favor of property owners in the vicinity of Los Angeles International Airport due to noise emanating from jet aircraft operating at the Airport." (Petitioner's Petition, p. 2.)

The foregoing statement is not only in error, but, in the opinion of Respondents, is grossly misleading. In this case Respondents neither sought, nor were awarded, damages for noise.

The crux of the Respondents' Complaint was that the City of Los Angeles, as owner and operator of the Los Angeles International Airport, was liable to them, by way of inverse condemnation, to the extent that their properties had been reduced in market value by reason of the noise of jet aircraft taking off and landing at the airport.

A succinct statement which illustrates this very important distinction is made by the learned Trial Court

(pp. 37 and 38, Appendix "B", of Petitioner's Petition) wherein Judge Jefferson stated:

> "Plaintiffs do not seek damages because of any personal injury, discomfort, or annoyance. Although the testimony establishes that jet noise interrupted normal conversation, radio and television reception and sleep, at times, no claim is asserted for these results as such. The evidence as to the effects of jet noise upon personal comfort, enjoyment or convenience in living was offered as a factor tending to show these effects caused a reduction in the fair market value of the respective parcels of real property. What plaintiffs seek in this action are money damages measured by the extent to which the market value of the respective parcels of property has been reduced because of noise from jet aircraft flying over and near these parcels located within and near the landing and takeoff patterns".

STATEMENT OF THE CASE.

The following Statement of the Case is made because Respondents deem it necessary to correct the many inaccuracies and omissions, which in the opinion of Respondents, Petitioner has made in its presentation of same.

Respondents feel that they must point out that the record is totally bare of the proof of the matters Petitioner described beginning with the second paragraph of page 4 through page 6 of its Brief. Respondents submit that even though they may well be true they have nothing whatever to do with the issues of this case.

Respondents offer the Statement of Facts of the Court of Appeal of the State of California, Second Appellate District, as an accurate statement of the case.[2]

In addition, Respondents wish to comment upon another error in Petitioner's Statement of the Case. In the last paragraph thereof, page 6 of Petitioner's Statement of the Case, Petitioner contends that on the authority of *Griggs v. Allegheny, supra,* the City of Los Angeles "has been held *solely* liable for the consequences of jet noise." (Emphasis our own.)

The foregoing contention is in error in at least two very important respects:

"[2]FACTS

Between 1959, when jet aircraft first began using LAX, and 1965, the City permitted gradually increasing numbers of jet flights to and from the airport.[1] These aircraft emit loud and disturbing noises. An acoustical expert with the consulting firm of Bolt, Beranek and Newman prepared a study for the Federal Aviation Administration entitled "1965, 1970, and 1975 Noise Exposure Forecast Areas for Los Angeles International Airport." The purpose of the study was to determine the effects of aircraft noise on land use in areas surrounding the airport. The effective perceived noise level (EPNL), which measures the annoyance caused by such noise, was determined based on known noise levels of the engines, altitudes, distances, flight paths, and take-off and landing patterns. Adjustments were made to reflect the number of flights per day and the timing of the flights, since frequent flights and nighttime flights are more annoying to residents. Based on these values three noise exposure forecast (NEF)

(This footnote is continued on next page)

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[1]The number of jet aircraft landing at Los Angeles International Airport was as follows:

Year	Yearly Number	Average Daily Landings
1960	20,171	55
1961	33,932	93
1962	47,215	129
1963	59,776	164
1964	69,503	191
1965	86,855	238

1. Neither the trial court nor the District Court of Appeal ever interpreted *Griggs, supra,* as standing for the proposition that *sole* liability for noise emanating from jet aircraft rests with the operator of the airport.

2. Neither the trial court nor the District Court of Appeal ever interpreted *Griggs, supra,* as standing for the proposition that *any* liability for noise, *per se,* emanating from jet aircraft rests with the operator of the airport.

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areas were determined.[2] NEF area C was the one in which jet aircraft noise had the greatest effect upon people below. Single family construction is not recommended in NEF area C because noise is likely to constitute a severe interference with the use of land for that purpose. The bulk of the properties originally involved in this suit are in NEF area C.

A few of the individual plaintiffs testified about the disturbing and annoying effects which the jet noise had on conversations, radio and television viewing and sleep. There was also some testimony that soot, oil and fuel from the aircraft fell on some of the parcels involved causing damage to painted surfaces and preventing homeowners from keeping their cars uncovered or drying clothes in their yards. However, recovery is not sought for the noise and other inconveniences as such, but rather for the diminution in property value caused by them.

Most of the trial was occupied by the testimony of a team of appraisers for plaintiffs. They visited the properties of the named plaintiffs in 1963, heard the jet noise themselves, and prepared appraisals of the properties involved. They appraised the market value of these properties and what their market value would have been if unaffected by jet noise, based on sales of comparable properties in other areas. The trial court determined that 581 of the parcels had been damaged and their market value reduced by the jet noise.[3] The reductions in market value ranged from $400 to $6,000 but were preponderantly in the neighborhood of $1,000. In the judgment the court also granted an easement to the City for flights of jet aircraft in the air space over and near the properties involved, to the extent of such usage in May 1963, which was determined to be the time of the taking or damaging of property in this case."

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[2]For a readable explanation of this noise measurement technique, see Comment, *Port Noise Complaint* (1970) 6 Harv. Civ. Rts.-Civ. Lib. L.Rev. 61, 65-74.

[3]This case originally involved some 750 parcels. The trial court found that some of them had not been damaged. Furthermore, as to 61 of the 581 damaged parcels, the plaintiffs presented inadequate proof of ownership and therefore compensation was granted only as to 520 parcels.

All references to *Griggs, supra,* made in the published opinions of the Trial Court and the District Court of Appeal and the propositions for which it is cited follow (the page numbers refer to the page numbers of Appendices attached to Petitioner's Petition):

Pages 7-8: The municipal operator has the responsibility to acquire and pay for the air easements necessary for the operation of the airport.

Page 22: "The fact that the City plans, builds and operates the airport is sufficient to impose liability."

and

"The fact that flights are within the navigable air space does not immunize the owner and operator of an airport for failure to appropriate the land and air space necessary to provide an adequate approach way.

Page 28: "Although many parties other than the City may have helped to create the problem, the City's role as planner, owner and operator of the airport is sufficient to require it to compensate plaintiffs *in this case.*" (Emphasis our own.)

Page 64: The United States Supreme Court in *Griggs, supra,* rejected the airport operator's defense that it could not be held liable because it had no control over the airline's choice of aircraft engines or the flight altitudes on the glide paths to and from the airport.

REASONS FOR REFUSING THE WRIT.

A. Introduction.

Respondents have heretofore in this brief raised the *following jurisdictional* objections:

1. The Petition was not filed in time.
2. Petitioner has failed to show circumstances which permit it to invoke jurisdiction under *28 USC 1257(3)*.

Respondents will now proceed to a discussion of errors in the reasons advanced by Petitioner to support its contention that a writ should issue.

B. The Preemption Doctrine Does Not Act to Preclude Liability of the Airport.

1. Petitioner Makes No Showing That Congress Intended to Preempt State Action in the Form of Relief Granted in the Instant Case.

Beginning on page 10 and continuing through about one-fourth of page 11 of its Petition, Petitioner contends that certain express provisions of the Federal Aviation Act of 1958 indicate a Congressional intention to preempt the area in which the California courts have acted in the instant case.

Petitioner cites the direction to the Administrator to prescribe air traffic regulations . . ."for the protection of persons and property on the ground . . ." *49 USC Sec. 1348(c)*, together with the Congressional directions to the Administrator to prescribe ". . . such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise . . ." *49 USC Sec. 1431* as authority for its conclusion that all consequences of jet noise have been preempted by the United States.

But, in so doing Petitioner pointedly ignores *49 USC Sec. 1506* which states:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in *addition* to such remedies." (Emphasis our own.) *49 USC Sec. 1506.*

On page 11 of its Petition, Petitioner refers to a Senate Report on the 1968 Legislation which, in turn, refers to a portion of a letter from the Secretary of Transportation, which, in turn, refers to the case of *American Airlines v. Town of Hempstead,* 272 F.Supp. 226, presumably in support of Petitioner's argument of the Congressional intent necessary to establish pre-emption.

Because of its hearsay-on-hearsay character Respondents question the value of such a letter when offered as proof of Congressional intent. However, Respondents do believe that the statement of law made by the Court in *American Airlines v. Town of Hempstead* is a very accurate description of what the Court of Appeal (Second Appellate District) and the trial court in the instant case and the Respondents believe it to be. It follows:

> ". . . the case is not involved with landowners' rights, or with concepts of trespass or nuisance. The ordinance is not an exercise of landowners' rights, but it is, if valid, an exertion of police power purely as such; . . . So far as landowners are concerned, they are constitutionally entitled to just compensation if overflights are such in nature, proximity and frequency as to amount to a taking of the property for public purposes (*United States*

v. Causby, 1946, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206; Griggs v. Allegheny County, 1962, 369 U.S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585); but that does not constrict the federally granted public right of freedom of transit through air space, including that needed for safe landing and take-off, . . ."

American Airlines v. Town of Hempstead, 272 F.Supp. 226, 231.

Respondents submit to this Honorable Court that the foregoing is not only a proper statement of the law, but also, that it is a most compelling and persuasive argument against Petitioner's contention that the preemption doctrine acts so as to preclude liability of the airport operator.

2. Application of the Tests of Rice v. Santa Fe to the Facts of the Instant Case Do Not Support Petitioner's Theory of Federal Preemption.

On page 13 of its Petition, Petitioner accurately sets forth three classic tests for determining whether the Federal Government has preempted an area.

But from there on forward, *i.e.*, page 13 through page 19, Petitioner cites case after case, *all of which miss the mark.* Petitioner, by citing those cases, proves over and over something which Respondents have always conceded, *i.e.*, that local governments are precluded by reason of federal preemption from any attempts to control noise from aircraft by attempting to impose curfews, regulate the quantum of noise they emit, or any other similar exercise of police power.

C. Requiring the Municipal Operator of an Airport to Comply With Its Constitutional Duty to Pay Just Compensation to the Owners of Land It Takes or Damages Will Not Result in an Undue Burden on Interstate Commerce.

The fulcrum upon which Petitioner's contention rests is stated by it on page 21 of its Petition as follows:

> "It necessarily follows that the imposition of severe financial liability results in an undue burden on interstate commerce."

Apparently the thrust of Petitioner's argument is that compliance with the state law is so expensive that it should be permitted to ignore it. But what is the state law from which Petitioner feels it must be shielded? Is it confiscatory? The answer to the rhetorical question posed above is "no." Surely compliance with *Article I, Section 14 of the California Constitution* cannot be construed as thrusting a burden on the flow in interstate commerce.

Section 1239.3 of the *Code of Civil Procedure* of the State of California provides:

> "Airspace above the surface of property or an air easement in such airspace may be acquired under this title by a county, city, port district, or airport district if such taking is necessary to provide an area in which excessive noise, vibration, discomfort, inconvenience or interference with the use and enjoyment of real property located adjacent to or in the vicinity of an airport and any reduction in the market value of real property by reason thereof will occur through the operation of aircraft to and from the airport. (Added by Stats. 1965, c. 1564, p. 3653, Sec. 1.)"

If this Honorable Court were to accept Petitioner's theory that compliance with Article I, Section 14 of the California Constitution creates an "undue burden on interstate commerce" the net effect of such a ruling would be to permit all airport operators within the State of California to take air easements anywhere within the state and escape liability from the landowners merely by leasing their facilities to interstate air carriers.

D. Re Local Control of Noise.

Petitioner, pages 22 and 23 of its Petition, attempts to read into the California decision an attempt to control aircraft noise. As hereinbefore set forth the decision appealed from dealt only with property rights.

E. There Is No Necessity to Review Griggs v. Allegheny.

Griggs was decided in 1962. Respondents filed their action during April, 1964 for damages to or taking of property, during 1963. The Trial Court found, and the District Court of Appeal affirmed, that the act of inverse condemnation took place during May, 1963.

Petitioner's contentions, pages 24 through 27 of its Brief, relate only to the action of Congress and the Courts to assure federal control of the use of the airlanes and, since 1972, aircraft noise abatement.

No citation, of statute or decision, is given by Petitioner to justify modification of the holding of the *Griggs* case.

Petitioner alludes to a possible defect in parties in that the airlines were not in the action. Note is made that such affirmative defense was alleged by Petitioner and was stricken prior to trial.

It is submitted that Petitioner could have, should it have so desired, cross-complained against the airlines, or others, in this action, but failed to do so.

Conclusion.

Writ of Certiorari should not issue for the following reasons:

1. The Petition was not timely filed.
2. The case does not fall within the requirements of 28 USC 1257(3).
3. There is no special or important reason for the review of *Griggs v. Allegheny*.
4. The law, as heretofore described, has been properly applied in the instant case.

Respectfully submitted,

JAMES E. SLOAN,
Attorney for Respondents.

Of Counsel:
LYLE C. ELLIS.